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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

UNITED STATES OF AMERICA, )

Plaintiff, )

VS. )

JONATHAN JOSEPH NELSON, ET AL., )

Defendants. )

**NO. CR 17-0533-EMC**

**SEALED**

San Francisco, California

Friday, March 11, 2022

**TRANSCRIPT OF PROCEEDINGS**

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Friday - March 11, 2022

1:00 p.m.

P R O C E E D I N G S

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**THE CLERK:** The Court is calling the case United States vs. Jonathan Joseph Nelson, Criminal action 17-533; U.S.A. vs. Brian Wayne Wendt, and U.S.A. vs. Russell Taylor Ott. The Court has allowed all other counsel and defendants to appear by Zoom.

Counsel, please state your appearance for the record, beginning with the Government.

**MR. BARRY:** Good afternoon, Your Honor. Kevin Barry, Ajay Krishnamurthy, and Lina Peng for the United States.

**THE COURT:** All right. Good afternoon, Mr. Barry.

**MR. CLOUGH:** Good morning, Your Honor. Michael Clough on behalf of Mr. Lyles, who is watching on Zoom.

**THE COURT:** All right. Thank you, Mr. Clough.

**MR. GOHEL:** Good afternoon, Your Honor. Jai Gohel and Richard Novak for Jonathan Nelson. He is present and watching by Zoom.

**THE COURT:** All right. Thank you, Jr. Gohel.

**MS. AMRAM:** Good afternoon. Galia Amram on behalf of Damien Cesena, who is present via Zoom.

**THE COURT:** All right. Thank you, Ms. Amram.

**MR. BABCOCK:** Erik Babcock for Brian Burke, who is also present by Zoom.

1           **THE COURT:** All right. Thank you, Mr. Babcock.

2           **MS. POLLOCK:** Good afternoon, Your Honor. Randy Sue  
3 Pollock on behalf of Jeremy Greer. I would request his  
4 appearance be waived today.

5           **THE COURT:** All right. So waived. Thank you,  
6 Ms. Pollock.

7           **MR. WALSH:** Good afternoon, Your Honor. John Walsh on  
8 behalf of Christopher Ranieri, and I also request that his  
9 presence be waived.

10          **THE COURT:** All right. So waived. Thank you,  
11 Mr. Walsh.

12          **MR. WALSH:** Thank you, Your Honor.

13          **MR. WAGGENER:** Good afternoon, Your Honor. This is  
14 Robert Waggener. I'm appearing for Russell Ott, who is  
15 appearing by Zoom. Co-counsel in the case, Marcia Morrissey,  
16 is not attending today's proceeding, but there is a piece of  
17 information regarding that that I want to provide to the Court.  
18 It has to do with some medical issues for Ms. Morrissey.

19           She took a serious fall in Southern California eight days  
20 ago. She was hospitalized. She had surgical repair to her  
21 hip, and so she's now been released, and she is home  
22 recuperating with physical therapy and prescribed painkillers.  
23 So I don't really know -- I talked to her this morning, and  
24 it's -- I'll keep the Court apprised of what the situation is.

25          **THE COURT:** All right. Well, I'm sorry to hear that,

1 and I wish her a speedy recovery.

2 **MR. BORO:** Good afternoon, Your Honor. Albert Boro  
3 for Defendant Raymond Foakes, who is present by Zoom in  
4 custody.

5 **THE COURT:** All right. Thank you, Mr. Boro.

6 **MR. THOMSON:** James Thomson on behalf of David Diaz,  
7 who is appearing by Zoom, Your Honor.

8 **THE COURT:** All right. Thank you, Mr. Thomson.

9 **MR. THOMSON:** You're welcome.

10 **MR. BUSTAMANTE:** Good afternoon, Your Honor. James  
11 Bustamante on behalf of Merl Hefferman, who is appearing by  
12 Zoom.

13 **THE COURT:** Good afternoon, Mr. Bustamante.

14 **MR. PHILIPSBORN:** Good afternoon, Your Honor. Alex  
15 McClure and John Philipsborn for Mr. Wendt, who is present in  
16 custody, and I apologize for being late.

17 **THE COURT:** Thank you, Mr. Philipsborn.

18 Has everybody made their appearance at this point? All  
19 right.

20 Before I start in with the motions in limine, let me cover  
21 one thing, and that is the jury selection process. I have  
22 submitted to our jury administrator the questionnaire, the  
23 proposed questionnaire largely adopting what the parties have  
24 agreed to. Some there wasn't agreement, but I've made  
25 decisions about what's going to be in, what's going to be out.

1 I've also tweaked some of the questions and added a couple  
2 myself, but it's fairly lengthy. It's like 23-pages long, 70  
3 questions or so. But given the gravity of this case, I think  
4 it's appropriate -- and it does mean there is going to be a lot  
5 of pages to look at.

6 And so as a result, what I want to do is set a time prior  
7 to the actual in-court *voir dire* for the parties to get  
8 together with me to go over the written questionnaires to see  
9 if there are some folks that we can just simply say don't  
10 bother coming in. And the more we can sort of vet that group,  
11 I think the more efficient we can be in terms of the in-court  
12 *voir dire*.

13 So I have -- and I don't know how long this is going to  
14 take. There may be -- given the number of people we're going  
15 to have to try to summon in, which will probably be in excess  
16 of 200 -- so you multiply that by 23 pages or so and you've got  
17 a lot of reading to do.

18 But I have the morning of the 6th, Wednesday April 6th, as  
19 well as most of the day -- the first half of the day, first  
20 portion of the day of the 8th on Friday. I think if we meet  
21 those two times, that will be enough to get through -- at least  
22 sort of weed out those that we can come to an agreement on or  
23 that I decide have made such a showing, for instance, of  
24 hardship or cause or anything else that we don't need to have  
25 them coming in and taking up time and space.

1           So I'm going to set April 6th at 9:00 and April 8th at  
2           9:00 as a hearing to go over the questionnaires and see if we  
3           can come to some agreements on that. So I want to get that on  
4           calendar.

5           The other thing is the vaccination status -- I wanted to  
6           bring that up -- of witnesses, counsel, and the parties,  
7           including the defendants. I would like to know what the  
8           vaccination status is of the trial participants, putting aside  
9           the jury question. I raised that with you before, and we'll  
10          talk about that at some point, but with respect to the parties,  
11          counsel, and the witnesses, at least, that are intended to be  
12          called, I'd like to know the vaccination status.

13          So first let's start with counsel. For those who are on  
14          either side, is there anybody who hasn't been fully vaccinated  
15          that I should know about? All right. It sounds like everybody  
16          is.

17          In terms of what about the three defendants?

18               **MR. NOVAK:** Your Honor, this is Richard Novak for  
19          Mr. Jonathan Nelson. He has not been vaccinated.

20               **THE COURT:** Okay.

21               **MR. NOVAK:** When the Court is done with this issue, I  
22          did have a question about the dates that the Court just set on  
23          the 6th and the 8th.

24               **THE COURT:** All right.

25               **MR. NOVAK:** I'll hold those.



1           **THE COURT:** All right. What about Mr. Ott and  
2 Mr. Wendt?

3           **MR. WAGGENER:** Mr. Ott has been fully vaccinated.

4           **THE COURT:** Okay.

5           **MR. PHILIPSBORN:** Mr. Wendt has been vaccinated,  
6 Your Honor.

7           **THE COURT:** All right. And can I assume, Mr. Novak,  
8 that Mr. Nelson -- his status won't change before trial?

9           **MR. NOVAK:** It's not going to change, Your Honor, and  
10 I think to get into it in a public hearing is --

11           **THE COURT:** I don't need to get into it. I just need  
12 to know the status.

13           **MR. NOVAK:** That's not going to change.

14           **THE COURT:** All right. What about the witnesses?  
15 Does the Government know the vaccination status of the  
16 witnesses?

17           **MS. PENG:** We do not, Your Honor.

18           **THE COURT:** Okay. Because that may influence what  
19 I -- whether I require masks, etc., etc., what precautions  
20 of -- because I am contemplating with the -- with the numbers  
21 approaching where they are, that I may change the mask rule.  
22 We can see how it -- it causes some difficulty even with the  
23 clear mask in terms of clarity, so it's not ideal, but I -- you  
24 know, what I would -- what I would like the Government to do  
25 is, especially as we get to hopefully paring down that witness

1 list, which I guess we'll talk about next week, I'm hoping that  
2 with some stipulations and things, the Government will pare  
3 that down so it's a more reasonable number, that I find out in  
4 advance which witnesses are vaccinated, and if there are any  
5 that aren't, who isn't vaccinated. So I will require that  
6 information.

7 **MR. BARRY:** And, Your Honor, if someone is unwilling  
8 to tell us, then we'll just indicate that they should mask.

9 **THE COURT:** Yes. If they don't -- well, yeah. If  
10 they say they don't want to say, I need to know that, too.

11 **MR. BARRY:** And, Your Honor, I think this could sort  
12 of -- especially if there are administrative witnesses, if --  
13 it sounds like this also can be sort of a game-day decision,  
14 like if we find out, that can be a question we ask them right  
15 before they take the stand. If they're not vaccinated or they  
16 don't want to say, we'll just give them masks.

17 **THE COURT:** Well, I may require a rapid test. I'm  
18 looking at it, and I'm going to get some consultation about,  
19 you know, health risks, and I'll have to make a decision about  
20 any defendant. I guess we have one who is not vaccinated,  
21 whether we would have a rapid test, so I will put on the table  
22 that's something I'm considering in addition to the masks.

23 All right. So I just want to flag that so you can begin  
24 to make some inquiries -- since you have such a long list of  
25 witnesses, that we will need to know vaccination status. Same

1 with the Defense witnesses. Anyone that comes in the  
2 courtroom, because I also want to be able to represent to the  
3 jury, prospective jurors who may have concerns about COVID,  
4 what are the protocols, what are the protections because that  
5 may be relevant to their willingness to serve, their comfort in  
6 serving, etc., etc., so that's another reason.

7 All right. So you had a question about the dates,  
8 Mr. Novak?

9 **MR. NOVAK:** Yes, Your Honor. And if I'm behind the  
10 curve on some of my colleagues, I'm sure I will be corrected,  
11 but the last time we were on the record discussing the jury  
12 selection process, I believe that the Court said we would have  
13 the completed questionnaires available to us by the 6th and  
14 then we would meet in court on the 11th to deal with, I guess,  
15 what I'll just call for-cause challenges, which is really what  
16 I think the Court was talking about that can be agreed upon,  
17 and now the Court is talking about doing that on the 6th and  
18 the 8th. So, again, if I'm being slow or redundant, I  
19 apologize, but I'm wondering when we will have the completed  
20 questionnaires prior to the 6th.

21 **THE COURT:** All right. Well, that's a fair question.  
22 My indication is that we can get these -- because we're getting  
23 it to the jury administrator in advance, I think we can get the  
24 questionnaires back more quickly. So that's a fair question  
25 because obviously if we can't get them back until the 6th, then

1 that's not going to work because you need -- given it's going  
2 to be a couple thousand pages, we are all going to need some  
3 time to go over them. I am assuming that you'll be able to get  
4 this at least two days in advance, if not more, perhaps as  
5 early as the beginning of April, but that's a fair question  
6 because if there is not enough time, then it's not going to  
7 work, but if we can do it, I'd rather get ahead of the curve  
8 because otherwise, you know, if we end up -- frankly if, for  
9 instance, we find that out of the 200 and something we can't  
10 draw a pool, we've got to go back to the well and get more  
11 people, and then the process ends up taking a lot longer than  
12 we thought, and then pretty soon, you know, we're not actually  
13 starting trial until the end of April or some date, and I don't  
14 want to get into that. So that's why I'm trying to push this  
15 up, but I hear you in that you need a decent amount of time.

16 **MR. NOVAK:** Yes. And I think that -- I may be wrong  
17 about this because I'm not looking at notes, but I think the  
18 Court initially -- when we talked about this, the Court thought  
19 we would have them on the 6th. The Court said why don't we  
20 meet on the 8th, and I made a pitch for at least having the  
21 weekend to prepare, and Your Honor said okay, we'll do it on  
22 Monday the 11th. I'm saying if the Court wants to start on the  
23 6th, that's fine, but, yeah, I think we need them --

24 **THE COURT:** By the Friday before?

25 **MR. NOVAK:** Yeah. At least. And I don't know what my

1 colleagues think, and some of them have been more involved in  
2 the jury questionnaire work than I., so...

3 **THE COURT:** Well, let's do this. I would like you to  
4 pencil in the 6th and the 8th. It may be we don't do the 6th,  
5 we do the 8th, or it may be that we don't do either, but I  
6 would rather have that as an option if we can get these things  
7 back early, the week before.

8 **MR. NOVAK:** Does the Court know when the jury  
9 commissioner will punch that button that sends out the  
10 SurveyMonkey and what the deadline for responding will be?

11 **THE COURT:** That's what I'm going to confirm. She was  
12 in the middle of -- she's a little preoccupied with a couple  
13 other matters so I'm going -- I will email her today to see if  
14 I can get an update on that. But that's why I pressed you for  
15 the joint -- and I worked over the last weekend to get it to  
16 her so that she could get this thing ready to go.

17 So let me -- and I'll report back to you all by way of a  
18 minute order or something. But I hear you. You need time.  
19 You need at least a weekend to go -- a weekend and some days to  
20 go over it. But if you could pencil in the 6th and the 8th, if  
21 worse comes to worse, we can't get it out until the 6th or get  
22 it back until the 6th, then I guess we'll go with original plan  
23 A, but I am concerned because we're not time qualifying these  
24 people based on our earlier discussion, so we are going to get  
25 a lot of hardship stuff, and I think in the Holmes case, even

1 with time qualification, they lost quite a few people on that.  
2 Let's see what happens here.

3 **MS. PENG:** Your Honor --

4 **THE COURT:** Yes?

5 **MS. PENG:** -- one administrative matter. Will you be  
6 filing for the record the actual questionnaire that you will be  
7 sending out resolving the objections?

8 **THE COURT:** I can send that. I think I've heard your  
9 views. If you want to look at it, I'll -- we'll get that  
10 out -- I'll get that out today.

11 **MR. NOVAK:** I think it would help us, Your Honor, to  
12 have the questionnaire so that whatever preparation we can  
13 do --

14 **THE COURT:** Yeah.

15 **MR. NOVAK:** -- for scoring them, so to speak.

16 **THE COURT:** All right.

17 **MR. BARRY:** This is Kevin Barry, Your Honor. The 8th  
18 and the 6th, those hearings will be in person in Your Honor's  
19 court?

20 **THE COURT:** Yeah. I think as we get to trial, we  
21 might as well do these things in person.

22 **MR. BARRY:** I think it's probably a critical stage,  
23 Your Honor, so...

24 **THE COURT:** Yeah.

25 **MR. PHILIPSBORN:** Your Honor, two last questions --

1 John Philipsborn. You -- I believe you made this clear to us,  
2 but it sounds as though you are going to be doing a  
3 hardshipping as part of the meeting on -- you're going to be  
4 expecting us to join you in doing a hardshipping beginning on  
5 the 6th, assuming everything goes forward as you planned?

6 **THE COURT:** Hardshipping, and if there is some obvious  
7 cause issues, yes.

8 **MR. PHILIPSBORN:** Got it.

9 And the second thing is, Your Honor, do you happen to know  
10 if the people in the jury services office could actually -- can  
11 provide you with a list of the returned questionnaires in a  
12 particular order so that essentially we have some idea of what  
13 the priorities may be which might facilitate our being ready on  
14 these days?

15 **THE COURT:** Yeah. You will get an order. You will  
16 get the list. You will get the order.

17 **MR. PHILIPSBORN:** Thank you, Your Honor.

18 **THE COURT:** Now, the other thing is I'm going to use  
19 and call jurors by number and not name. You'll have the names  
20 on the list and they may be on the questionnaire, but when we  
21 get to court, it's going to be -- I'm going to refer to Juror  
22 No. 1 as opposed to "Mr. Smith." That's my intent at this  
23 point.

24 **MR. BARRY:** Your Honor, this is Kevin Barry. We ask  
25 that the parties do that, too, for the sensitivities that we

1       faced at the last hearing.

2               **THE COURT:** Yes. And I'm going to order -- you'll  
3       have the parties' names, but that should be under protective  
4       order. I don't want names -- it should stay under protective  
5       order. So that is my intent. You'll know who they are, but in  
6       terms of, you know, addressing folks, it will be by number.

7               All right. So let's talk about the MILs. I'm not going  
8       to go through every one of these. We could probably be here to  
9       the evening, if I did, but I'm going to go through a lot of  
10      these, and some of these are just questions that I have so I  
11      fully understand in order for me to rule. So let me just  
12      start.

13              I'll just start with the Government's MILs, and the first  
14      one is about DMV records, and I'll just trying to understand,  
15      are these just records to show ownership of vehicles and  
16      addresses, or is there -- is there something else in there that  
17      these are for?

18              **MS. PENG:** They are just DMV records showing  
19      ownership, Your Honor.

20              **THE COURT:** And that's the purpose, to show ownership?

21              **MS. PENG:** Correct.

22              **THE COURT:** Let me ask about No. 2, evidence of  
23      regularly-conducted actively. These include medical records,  
24      cell phone call detail, and there's reference here to some of  
25      these records containing information that's beyond documenting,



1 for instance, medical injury. There's some reference in here  
2 about a narrative description from the victim's wife and other  
3 stuff.

4 What's the Government's view about that? Are these going  
5 to be redacted or what's the plan?

6 **MS. PENG:** Your Honor, our position is that all of  
7 these statements are admissible under 803(4) and 803(6).  
8 803(4) states that statements made for the purpose of medical  
9 diagnosis and treatment are admissible, and that's a classic  
10 exception. I mean, certainly for purposes of medical  
11 diagnosis, the background of what happened to the patient is  
12 relevant, and it's considered a classic exception that's  
13 permitted without sort of fine tuning the exact language in  
14 there.

15 And, furthermore, medical records themselves are routinely  
16 admitted under 803(6) as business records. And, you know, the  
17 Ninth Circuit has held that repeatedly. So our position is  
18 that these records are admissible wholesale.

19 **THE COURT:** All right. Response from one of the  
20 Defense counsel.

21 **MR. GOHEL:** Your Honor, I can talk about this.

22 There are certain circumstances in which the  
23 information -- I am going to use one example as an assault  
24 victim, alleged victim in this bar fight.

25 **THE COURT:** Yes.

1           **MR. GOHEL:** You know, I think that's what the Court  
2 was referring to.

3           There is speculation embedded in there, there is lack of  
4 foundation, and unless they can show that the doctor  
5 specifically utilized that information, which has multiple  
6 levels of hearsay and speculation and lack of foundation, and  
7 even used it to make a diagnosis, then it's just pure hearsay  
8 and it's inadmissible. So we're going to make objections to  
9 that. I think it may have to come in case by case, but I just  
10 wanted to alert the Court in our in limine that there are going  
11 to be some statements that we are going to object to and ask  
12 for a foundation be laid. Not everything comes in a medical  
13 record.

14           **THE COURT:** Let me ask Ms. Peng. If it's not  
15 demonstrated that it informed the diagnosis or the course of  
16 treatment, is there any basis to admit that portion of the  
17 record?

18           **MS. PENG:** Your Honor, I think if you look at the case  
19 law, it's actually reverse; right? What Mr. Gohel said that  
20 there needs to be a showing that the doctor actually relied  
21 upon what was stated in the medical record to make a diagnosis  
22 before the exception applies, there is simply no legal  
23 authority for that proposition. Instead, if you look at the  
24 cases time and again, medical records, including the patient's  
25 description of background information that alleged the jury are

1 routinely admitted wholesale. This requirement that Mr. Gohel  
2 is pointing to, there is simply no legal authority --

3 **THE COURT:** I don't have any doubt that the patient's  
4 description of the background of what happened, you know, "the  
5 reason why I have a fractured hip is because," you know,  
6 "someone hit me and I fell," but if it -- if it amounts to, you  
7 know, what somebody said to him before and what he said back or  
8 the -- that -- I mean, it seems to me that it needs to be -- if  
9 it's going to come in as a medical record, it has got to have  
10 some nexus to a medical purpose.

11 Now, I haven't looked at these records specifically, but  
12 I'm just trying to get guidance, and it doesn't seem  
13 unreasonable to say that, you know -- and I don't know -- I  
14 haven't looked at it, frankly. I haven't looked at it, but if  
15 it is something that doesn't, on its face, appear to be related  
16 to treatment or diagnosis, then I have a harder time seeing how  
17 that's, you know, relevant.

18 **MS. PENG:** Your Honor, that's fair. If there is a  
19 report in there, which I don't think exists in the medical  
20 records that we're proffering, that says, you know, patient one  
21 says some other party stated X, right, that would be another  
22 layer of hearsay, but my recollection is that the medical  
23 records here are just routine descriptions of the events that  
24 occurred that led to the injury that they're seeking treatment  
25 for, putting it squarely within the classic exception.

1           Certainly if there are specific objections to something  
2     like that, like a report of a third-party statement in the  
3     medical record, that's fair. They can object to that, and we  
4     can resolve it that way, but overall, if it's a medical record  
5     containing routine descriptions of what happened to them, that  
6     comes in.

7           **THE COURT:** All right. Well, this is -- this  
8     underscores why I want to have this procedure -- and we'll talk  
9     about this at the pretrial conference -- of disclosure of  
10    witnesses and exhibits that are going to be used well in  
11    advance so that we can look at this, and I don't want to take  
12    time in front of the jury to start talking about how we are  
13    going to redact something.

14          **MR. GOHEL:** Your Honor, just one last thing. I mean,  
15    the Government has introduced these medical records. I'm just  
16    using an example. I won't use the person's name, but it's an  
17    alleged assault, a different alleged assault, alleged victim.  
18    I mean, there's, I don't know, 4- or 500 pages of medical  
19    records that involve all kinds of personal medical -- I mean,  
20    you're supposed to introduce medical records not wholesale.  
21    Like, what is relevant to the assault? If we are going to go  
22    into a person's -- whether it's his allergies -- I think  
23    there's at least a hundred pages about this person's issues  
24    with allergic reactions. I mean, we're not just going to admit  
25    that stuff. It's not relevant.

1           So the Government needs to hone this stuff down and it has  
2 to be relevant -- otherwise, it's just going to be these big  
3 stacks of medical records that are just -- clearly haven't been  
4 narrowed down and focused to what's relevant.

5           **THE COURT:** Well, without seeing it, I don't know.  
6 Allergies may be relevant because that may affect the course of  
7 treatment or may explain why somebody reacted in a certain way.  
8 I don't know without looking at it.

9           Now, if you're saying that the Government appears to be  
10 wanting to introduce a 300-page medical record on somebody when  
11 the gist of it is like four pages about the injury, then that's  
12 a 403 problem because I don't want the jury to have to deal  
13 with thousands of pages of stuff, so I would ask the Government  
14 to pare it down and make sure that what you want to get in is  
15 really relevant. And, sure, there is going to be some  
16 background information that may be necessary, but, again, not  
17 having seen this, I don't know, but there is a potential 403  
18 issue, too, if the stuff is just overwhelming.

19           But I can't make that judgment until I see it. But, you  
20 know, have flagged an issue. Hopefully the Government will  
21 keep that in mind, and when you do meet and confer about these  
22 exhibits, that's something you all can work out.

23           All right. So the big -- of the big ones, of course --  
24 and we've already had a hearing on Victim 6, and then there is  
25 other incidents of alleged sexual violence in this case, MJ and

1 BT, and I guess my -- my question is, first of all, the --  
2 the -- in this case, the -- the alleged perpetrator is not --  
3 the two perpetrators with respect to those two victims are not  
4 on trial in group one, so this goes really to the question of  
5 enterprise and showing the depth and the activities of the  
6 enterprise, but especially, since these two alleged  
7 perpetrators are not in this group, I have a concern about  
8 scope and what is the cumulative -- what is the incremental  
9 value of this stuff when, as the Government acknowledges, that  
10 there is a -- there is going to be a lot of evidence of overt  
11 acts, a lot of evidence from insiders about shootings of a  
12 homeless person, assaults, many, many, many assaults, drugs,  
13 guns, fraud. Why do we need this?

14 **MS. PENG:** I'll take this, Your Honor.

15 So I think -- the first thing I'll say is that for the  
16 purposes of the RICO conspiracy, I think the Second Circuit put  
17 this -- right? The crime is not the individual acts that are  
18 committed by each individual defendant, but the crime that's  
19 being targeted by the statute is the association by defendants  
20 of a long-running criminal enterprise, and it's that  
21 association in itself of a subculture of crime that really is  
22 the crime that is being targeted here.

23 **THE COURT:** Which is why I am allowing all the overt  
24 acts, even though they don't -- I know there has been a  
25 renewed challenge by Mr. Wendt to the eleven. I have already

1 ruled on that. I'm not going to revisit that. That stuff is  
2 coming in.

3 My question, the incremental value of these acts against  
4 the backdrop of all the other stuff coming in through CIs,  
5 through experts, through all this stuff, the murder, the Mongol  
6 stuff, why do we need this?

7 **MS. PENG:** Your Honor, I think -- first of all,  
8 Your Honor has already excluded some -- a good portion of the  
9 Government's case through its order to show cause hearing and  
10 the exclusion of what the Defense has described as a  
11 significant insider witness. So I would -- I would not agree  
12 that, you know, the Government at this point has an  
13 overabundance of evidence to prove the existence of enterprise.

14 But to your question specifically, you know, the  
15 Government needs to prove the existence of the criminal  
16 enterprise, and the testimony of MJ and BT go towards that in  
17 significant ways. In particular, I think if Your Honor were to  
18 look at all of these incidents in conjunction, they show a  
19 significant probative value as to the agreement amongst the  
20 parties with respect to the violence towards women.

21 And so if you look at the MJ incidence in particular, it  
22 happened over a course of time in three different instances  
23 with other members present, and then they specifically  
24 facilitated the assaults that occurred to make sure that no one  
25 stopped it from happening.

1           And so that is -- the assaults, although they may be of a  
2           different nature, are specifically alleged in the superseding  
3           indictment which alleges that it's the means of violence used  
4           to control people. And so this is another instance of that  
5           violence. It just so happens --

6           **THE COURT:** There is nothing in the superseding  
7           indictment about sexual violence another Victim 6; right? I  
8           didn't see that in there.

9           **MS. PENG:** Correct. But violence is violence,  
10          Your Honor. Just because it so happens that violence against  
11          women often takes the form of sexual violence does not make it  
12          different in kind of the violence that is alleged in the  
13          superseding indictment.

14          And, you know, I can address the notice issue before, but  
15          as Your Honor has mentioned, the fact that sexual violence is a  
16          part of the means of this enterprise is abundantly noticed by  
17          the fact that Victim 6's sexual assault is alleged specifically  
18          in the superseding indictment.

19          So going back to the idea of the treatment of MJ and her  
20          status as not just an "old lady" but as a girlfriend and the  
21          systematic particular abuse that she suffered as that status is  
22          part and parcel of the Government's case of how this enterprise  
23          uses violence to control and intimidate members of the  
24          community. So that is it directly relevant.

25          And the fact that she was being punished during one of the



1 first assaults for breaking a rule of the enterprise also makes  
2 it relevant to proving that the enterprise operated in a  
3 specific way. And the fact that this is repeated over time on  
4 multiple instances at motorcycle runs that are Hells Angels'  
5 activity with other Hells Angels' members present, again, makes  
6 this extremely probative of the enterprise.

7 And then the other thing -- and the same arguments can be  
8 applied with the BT instance as well.

9 And the other thing I'll say is that, you know, to exclude  
10 the testimony of MJ or -- of the assaults that she experienced,  
11 there is just no way to do that without wholesale excluding her  
12 entire testimony. So it's really, you know -- to say that she  
13 can't talk about the assaults really is tantamount to  
14 preventing her from sharing her experience as a victim of abuse  
15 at the hands of the Hells Angels altogether because --

16 **THE COURT:** Let me ask you this: Is her testimony,  
17 aside from the assaults -- she's going to -- it is the intent  
18 for her to testify about the ongoings, the doings, the sort of  
19 insider view of the HASC?

20 **MS. PENG:** She will also be providing information  
21 regarding how the organization -- how the organization  
22 functioned and its rules because she had to abide by those  
23 rules and experienced relationships with multiple members that  
24 are at issue in this case. So her testimony -- you know, she  
25 is going to -- that's actually related to one of the other

1 challenges that the Defense has been bringing against her  
2 testimony for lack of foundation for lay opinion testimony.  
3 And that's also why these assaults are relevant to that,  
4 because --

5 **THE COURT:** Can you be more specific? What is she  
6 going to testify about -- if she didn't testify about the  
7 actual assaults, what would her testimony be about?

8 **MS. PENG:** She would testify regarding the status of  
9 women and how they were treated by members. So she would  
10 testify about the structure of the old ladies and how they were  
11 treated relative to girlfriends and other women that did not  
12 have girlfriend status. She would be testifying that she was  
13 considered the property of Foakes and that, you know, that was  
14 a common ethos that was shared amongst members towards women  
15 that were associated with them.

16 And then -- so, you know -- and her experiences with  
17 different members while she was associated with them.

18 **THE COURT:** What does that mean? Can you be more  
19 specific, "experience with other members"? What does that  
20 mean?

21 **MS. PENG:** I think she originally was in a  
22 relationship with a different member of the Hells Angels before  
23 she became the girlfriend of Foakes. She was asked to live at  
24 a marijuana grow as basically an indentured servant at the  
25 direction of Foakes. That was Russell Lyles' marijuana grow.

1 So she has multiple connections with multiple members of the  
2 Hells Angels and gives her a foundation to testify as a lay  
3 witness about how the enterprise operated.

4 **THE COURT:** All right. So she has a foundation to  
5 testify because she was there, she was told things, she saw  
6 things. Assuming that foundation is laid, why would the  
7 actual -- there are, like, three -- three incidents -- at least  
8 three -- about the -- about what happened to her. Why does  
9 that need to be -- why does that need to be included in her  
10 testimony?

11 **MS. PENG:** It's because her experience can -- of being  
12 abused by members of the Hells Angels cannot be extricated from  
13 her testimony overall about the enterprise. Her, more than, I  
14 think -- you know, maybe even more than MC -- actually more  
15 than MC -- her entire experience with the Hells Angels is  
16 intertwined with an experience unfortunately of abuse. And it  
17 goes towards her credibility, and the flip side of that is that  
18 it goes towards her bias as well which the Defense inevitably  
19 will attempt to impeach her on.

20 And so the requirement that the Government, number one,  
21 lay a foundation for her opinions I think will include her  
22 experience of being assaulted, and, second, the fact that the  
23 jury is required to assess completely the credibility of the  
24 witness which, again, her -- her -- the significant portion of  
25 her experience are these instances of abuse that she suffered.

1 There is just no way for her to credibly testify as a witness  
2 without going into these incidents.

3 And so that's another --

4 **THE COURT:** All right. Let me hear the response.  
5 Those are pretty good arguments. Why not? There is probative  
6 value here if it goes -- it informs the foundation of her  
7 testimony about the workings of the HASC. It goes to her  
8 motive, potential bias, etc., etc.

9 **MR. GOHEL:** Your Honor, maybe I can -- I think  
10 Ms. McClure chime in.

11 So this, even more so than alleged Victim 6, involves  
12 issues of 403. This is -- these are incidents that were  
13 only -- just a little background. These are incidents -- this  
14 person was interviewed at least a half a dozen times in lengthy  
15 interviews starting in 2008, 2011, and the first time that she  
16 brought it up was after this RICO indictment was charged in  
17 June of 2020 at an interview, I think, that some of the  
18 prosecutors in this case were involved in, and she brings up  
19 this information. So she never brought it up before. She  
20 never had any -- never raised it in any fashion.

21 Then -- and I understand that may go more to the weight  
22 than the admissibility, but it also goes to the 403 aspect of  
23 this. None of these incidents, for example, allegedly involved  
24 Jonathan Nelson. She doesn't even name who the other alleged  
25 Hells Angels that Ms. Peng is claiming were there -- she can't

1 even name a single person that was there, who they were. One  
2 time she claims that it was while she was inside a tent, and so  
3 how are you going to know that there are Hells Angels outside  
4 and who they are is, quite frankly, preposterous.

5 So I think if we had an evidentiary hearing with respect  
6 to Victim 6, we definitely need to -- and I would request on  
7 behalf of Mr. Nelson since it's so prejudicial, the idea that  
8 some incidents that she doesn't give a specific time or -- time  
9 or place for, never gives a specific time, never gives a  
10 specific place --

11 **THE COURT:** But she appears to testify that there were  
12 three incidents in which she was raped: One in a tent, one in  
13 a hotel room and once at the clubhouse with other members of  
14 the HASC there, either surrounding or being there and not  
15 helping, and she doesn't identify any of the three, but that's  
16 a slightly different issue.

17 I mean, I understand that goes to the probative value to a  
18 certain extent, but it still -- it still seems relevant. I  
19 mean, arguably -- conditionally relevant based on her  
20 testimony, and even in a 104 hearing, all one would have to say  
21 is could a jury have believed her, you know.

22 **MR. GOHEL:** Well, but then the Court still would have  
23 to look at the 403 issue. If the 403 is issue is there of a  
24 single incident in which Victim 6 was claiming that she was  
25 sexually assaulted during a time that there is an enterprise

1 activity allegedly going on that is charged in another aspect,  
2 you have three individuals who are going to be in a trial in  
3 which this person is going to testify that there were sexual  
4 assaults of unnamed Hells Angels where she has no foundation to  
5 even know specifically that they were Hells Angels or not, at  
6 least on one of the incidents, and that evidence is just going  
7 to come in without there being some determination by the Court  
8 that this is -- that she has a proper foundation for the  
9 information, that it's -- and that it actually has probative  
10 value or if it's just something that was either made up or was  
11 created, let's see, 12 years after her initial lengthy 302  
12 interviews. So I think that this would be an appropriate issue  
13 for the Court to determine, just in the same vein that there  
14 was with Victim 6.

15 **THE COURT:** Are you saying that she should not be able  
16 to testify about the -- for instance, the status of women  
17 generally, the -- what it means to be an old lady, being  
18 treated as property and told what to do, that kind of stuff?

19 **MR. GOHEL:** Well, it is unclear, at least from her  
20 interviews, what her -- she didn't -- she didn't testify in  
21 front of the grand jury, but it's unclear what her -- the basis  
22 for that information is as it relates to other women or wives  
23 or girlfriends. She has what she claims to be her personal  
24 experience, but there is no indication that she has any  
25 information about what other women -- how other women are

1 treated with the Hells Angels, at least in the 302 reports that  
2 I've seen.

3 So I do think that there is a foundation problem with  
4 respect to that as well. So not only the specific instances --  
5 she has some information about the marijuana grow that  
6 Mr. Lyles was allegedly involved in, and she has some  
7 information possibly about, I think, one of the other overt  
8 acts that relates to the mortgage fraud where she worked there  
9 during a period of time. But other than that, these opinions  
10 lack foundation and certainly would need to be explored prior  
11 to something like this being admitted that, you know, all Hells  
12 Angels treat their women like, you know, property and they  
13 sexually assault them and/or domestically abuse them. And then  
14 also her specific instances where it's incredibly prejudicial  
15 and she doesn't even really have a foundation to know who these  
16 other alleged Hells Angels were, what their activities were  
17 with respect to keeping them away. So I think it -- it's  
18 something that would require a hearing.

19 **MS. PENG:** Your Honor, may I respond?

20 **THE COURT:** Yep.

21 **MS. PENG:** So, first of all, on the objection, again,  
22 of lacking foundation, I mean, counsel is really saying -- like  
23 the foundation can be laid; right? She has personal experience  
24 with Hells Angels members, multiple of them. She functioned in  
25 that role as the girlfriend and testifies about that

1 experience. To the extent that she doesn't know personally the  
2 experience of every other woman who has ever associated with  
3 the Hells Angels, that goes to weight, not admissibility.

4 So they are trying to preclude on the one hand her for  
5 lack of foundation and also preclude the very information that  
6 would provide the foundation for her knowledge in that it's her  
7 experience with those members.

8 And I will just say something on the 403 issue, too. So,  
9 you know, with respect to the sex assault, like I said, it's  
10 violence of a different kind, but also there is guidance on  
11 this, Your Honor. The Ninth Circuit, when it assesses cases of  
12 sex assault under Rule 413, which I understand the Defense says  
13 does not apply here, but even conceding that, we agreed that in  
14 those 413 cases, Rule 403 still applies and the Ninth Circuit  
15 says it still applies. But, nevertheless, in those cases where  
16 sex assault is directly alleged, the Ninth Circuit allowed in  
17 prior evidence of other sex assaults notwithstanding Rule 403,  
18 finding that it's not unfairly prejudicial. And in those  
19 cases, I would say it's much more unfairly prejudicial than in  
20 this case because there they are talking about the exact same  
21 offense.

22 And I would say here that, you know, they -- there --  
23 sorry -- in those cases they were admitted anyways, and the  
24 Ninth Circuit provides context for how to assess sex assaults.  
25 I think Your Honor should look to those cases in terms of



1 evaluating the relative level of prejudice. And here --

2           **THE COURT:** But part of -- part of the context goes to  
3 probative value. Probative value of what? In a sexual assault  
4 situation, it's highly probative because that is the very crime  
5 that is at issue. Here the sexual assault is being used to  
6 show an enterprise, sexual assault by others to show an  
7 enterprise by way of conduct that doesn't involve the direct  
8 three.

9           Now, it is relevant, and that's why I've allowed overt  
10 acts to come in, but in terms of its overall probative value,  
11 when you have lots of other enterprise evidence, that was my  
12 point, the -- the incremental value to prove the enterprise is  
13 less than when it is the sole evidence to prove the sexual  
14 assault. That becomes the main thing.

15           Here it's one of many things to prove one point. So I'm  
16 looking -- I'm looking at the incremental probative value on an  
17 issue that is relevant to this case which is enterprise or not.

18           **MS. PENG:** Right, Your Honor. But the 403 analysis is  
19 kind of a sliding scale in a way; right, because here, yes,  
20 it's not directly proving the -- another sex assault, but also  
21 because there are a host of other violent acts, including a  
22 murder, that makes these particular acts in the host of a RICO  
23 conspiracy less prejudicial as well because the jury is already  
24 going to hear all of these other acts of violence. I mean,  
25 this is part and parcel of that.

1           So I think in analyzing those sex assault cases where the  
2 Ninth Circuit did allow, I do think that they were more  
3 prejudicial in those cases and more probative, but we still  
4 have to look at the overall balance that is being struck here.  
5 And, you know, 403 requires that the evidence be excluded only  
6 if substantially outweighed by the risk of unfair prejudice, as  
7 Your Honor knows. And so I think the balance here weighs in  
8 favor of admission.

9           And the last thing I'll say on this is that we have to  
10 also look at the Government's case in terms of probative value  
11 collectively. So now you have MC, MJ, BT, right. All of this  
12 is very probative of a pattern of behavior, and the repeated  
13 nature of these acts is important, too, because it shows that  
14 the members knew what they were getting into when they decided  
15 to associate with this enterprise, and that these are not  
16 one-off events, that they repeat and they show a pattern, and  
17 that means they corroborate each other as well, and so the  
18 admission of all of these together makes it even more probative  
19 to the Government's case.

20           **MS. McCLURE:** Your Honor, may I respond briefly?

21           **THE COURT:** Briefly, and then I'm going to move on.

22           **MS. McCLURE:** We have gotten so far afield of what the  
23 charged conspiracies are in this case, Your Honor. It is  
24 unbelievable to me that we are at the point where we have an  
25 indictment, we have a bill of particulars, we've never had

1 sexual assaults and domestic violence against girlfriends and  
2 wives as part of an enterprise. That -- that wasn't the  
3 Government's theory until this motion in limine arrived.

4 So we have notice problems here. We have an issue of just  
5 the frame, how do we analyze this? The Government is assuming  
6 it is somehow relevant to the enterprise. It's other-act  
7 evidence. This is uncharged other-act evidence that has to be  
8 analyzed under that framework. I don't think we can just say  
9 any act of violence is somehow part and parcel.

10 And, look, the Government's cases that they cite even show  
11 you -- and I can't remember the name of it. Maybe  
12 Mr. Philipsborn will help me. I think it's *Zelaya*, but it's a  
13 case that talks about the limited purpose for which evidence of  
14 some violent -- or some act in the past is introduced. It  
15 can't just be if it's violent it comes in at this trial. And I  
16 think that is a fundamental flaw in the Government's argument,  
17 and we need to just sort of go back to what are we really  
18 talking about here and what are the conspiracies charged here.

19 There is absolutely no evidence that all the members of  
20 the Hells Angels know what is happening in the bedrooms of the  
21 other Hells Angels members. So this theory, the linking it  
22 together and corroborating each other, it is -- it is a  
23 fabrication, and I think at a minimum, we would need an  
24 evidentiary hearing before this prejudicial, inflammatory-type  
25 of evidence -- I mean, it really is mini trials, multiple mini

1 trials here of very personal, abusive situations -- allegedly  
2 abusive situations that have no bearing on the scope of this  
3 enterprise and certainly have nothing to do with Mr. Wendt,  
4 which is our focus.

5 But there has to be a tie, and when it's violent crime,  
6 there has to be some link to the enterprise, and that has not  
7 been made here. There is a creative argument, but it isn't  
8 based on the law, as far as I read it, and I would encourage  
9 the Court just to look at the cases cited in our brief.

10 **THE COURT:** All right.

11 **MR. WAGGENER:** Your Honor, could I make a brief point  
12 on behalf of Mr. Ott?

13 **THE COURT:** Very brief.

14 **MR. WAGGENER:** Because Defendant Ott filed a specific  
15 brief on this domestic violence and sexual assault issue, and  
16 that was authored by Ms. Morrissey, who isn't here, but there  
17 is also a 404 issue here, basically 404(b) character evidence  
18 issue. Basically that the proof of the argument from the  
19 Government is that because Rusty Ott is a Hells Angels, he  
20 beats his old lady and that every one of them does that. So I  
21 just refer the Court to that particular brief authored by  
22 Ms. Morrissey on the 403 and 404(b) issues.

23 **THE COURT:** I understand the 403 argument. I don't  
24 find that particularly persuasive. I think the big issue is  
25 403. The simple matter at the end of the day is what is the

1 incremental value of what is trying to be proved if what is  
2 trying to be proved is not Mr. Foakes' participation in the  
3 conspiracy but Mr. Ott's participation in the conspiracy. Then  
4 it only goes to the existence of an enterprise, not that  
5 perpetrator's participation, knowing participation.

6 So when you have a crime committed, allegedly committed by  
7 the person who is on trial, it seems to me there is -- at least  
8 an argument can be made there is sort of a double relevance  
9 there. It goes to both the existence of the enterprise as well  
10 as that person's participation, knowing participation if they  
11 are actually doing some of the acts.

12 When it's somebody else, then it only goes to the  
13 existence of the enterprise, and therefore the probative value,  
14 the incremental probative value goes down. I'm not saying it's  
15 nonexistent. I understand the Government's argument, but  
16 that's the -- that's the analysis, in my view. And I've got to  
17 weigh 403, and I think that's the key here, that probative  
18 value, that incremental probative value versus the prejudicial  
19 value. So that's how I'm going to look at it. So let's move  
20 on.

21 The presentation of character evidence, I'm not sure what  
22 we're talking about here. I understand that there's --  
23 Mr. Wendt says he's not seeking to present character evidence,  
24 and so I don't know -- if that's the case, then the Government  
25 has no basis for 404(a)(2)(A) or 405(b) exception. So

1 what's -- am I missing something here? I'm not sure. I just  
2 want to make sure -- am I correct that there is not going to be  
3 character evidence introduced by the Defense?

4 **MR. PHILIPSBORN:** Philipsborn for Wendt.  
5 Correct, Your Honor.

6 **THE COURT:** All right. Then there is no need for  
7 rebuttal. There is no need for impeachment of that.

8 **MR. BARRY:** Actually, Your Honor, let me just address  
9 that briefly.

10 I think it's going to come up in two ways. First, I  
11 anticipate that the -- each of the defendants is going to argue  
12 in closing -- in opening statements that these are family men,  
13 like all the points that are raised in the brief. I think  
14 that's all going to come out in the opening statement, and  
15 there's going to be no evidence to support any of that. There  
16 is going to be no testimony, unless there is character  
17 evidence, about whether someone was a college graduate, whether  
18 someone is a loving father, whether someone is an upstanding  
19 member of the community employing a lot of people. So that's  
20 the one issue. So if there is going to be no evidence of that,  
21 then it shouldn't come up in opening statement.

22 And the second point is, you know -- and we're not going  
23 to get into this now, but this incredibly late, you know, quasi  
24 alibi evidence introduced by Mr. Wendt is through his family  
25 members. And the notion that they're not going to slide in any

1 kind of character evidence, I just can't credit that, because  
2 the same thing happened in Williams. You know, I moved in the  
3 morning of these witnesses -- I said these witnesses are going  
4 to give character evidence about how upstanding these people  
5 are in the community. The answer -- the Defense said no,  
6 that's not going to happen. And, sure enough, you know, their  
7 opinions about who these people were and what they were all  
8 about and -- that all came sailing in and we were not able to  
9 address it.

10 So if that happens, fine, but I'm just putting the Court  
11 on notice that these are the two ways I think it's going to be  
12 at issue.

13 **THE COURT:** Well, if it gets -- if it comes in as  
14 evidence, then that will open the door. I mean, everybody  
15 knows the Rules of Evidence, and I'll have to see how it plays  
16 out.

17 All right. Let me ask Mr. Nelson's motions in limine,  
18 there -- and this is -- part of this is in the co-conspirator  
19 exclusion stuff. There is a lot of cross-reference to various  
20 statements. But my understanding is that if the witness heard,  
21 for instance, Mr. Nelson or one of the other defendants say  
22 something and not double hearsay but sort of single hearsay,  
23 then -- then, you know, that comes in as an admission of a  
24 party opponent.

25 On the other hand, if it's double hearsay, if Verhagen

1 says he heard from Beek that he heard from Nelson, then it's a  
2 double hearsay problem, and I can't tell from all this exactly  
3 how it's going to play out, but I'm going to make that  
4 observation. There is that problem.

5 And then there is a question about what if you're in a  
6 room and you can't tell who's making the statement or you're on  
7 the phone or whatever it is, and somebody said X, does that  
8 come in? And so then it's harder to say that's a party  
9 opponent if you can't identify that that was, in fact, one of  
10 the three defendants on trial, but it still could come in if,  
11 you know, there's a fair inference that it was somebody that  
12 was part of the club and part of the enterprise -- alleged  
13 enterprise and that the statement was made in furtherance of  
14 that enterprise. At least that's how I see it. And from some  
15 of this, it's a little hard to tell the exact context, but  
16 that's my framework.

17 Does anybody have a different view of how this should be  
18 analyzed?

19 **MR. NOVAK:** Your Honor, this is Richard Novak, and  
20 I'll try to address that quickly because I drafted that  
21 particular motion and that particular reply.

22 I think that the Court is correct, that there's a  
23 different evidence code analysis if you know that the statement  
24 was made by a party. I would point out that you still have a  
25 question of whether the statement is relevant, right, so not



1 every statement by a party is admissible as a party statement.  
2 There is -- there is an issue of relevance, and I'm not sure  
3 that they -- that 403 issues come up in these statements which  
4 we're debating, but you still have relevance and 403.

5 But you're correct, Your Honor, that if the witness  
6 doesn't know who said it, it raises other issues, namely, the  
7 question of whether it's made during and in furtherance of by a  
8 member of the conspiracy. And then where somebody -- and it's  
9 typically BT, right, statements 52 through 64 -- overhears  
10 conversations between two other people -- I think many of those  
11 are supposedly Mr. Nelson and Mr. Lyles -- but she can't say  
12 who said what, I think that creates serious problems, not only  
13 as the co-conspirator statement because I do think it becomes  
14 mere chatter among a couple people that doesn't move the  
15 enterprise forward which is what I think the case law has to  
16 say. The statement has to have a purpose; right? It's for the  
17 purpose of. It's not just chatter. It's not just, you know,  
18 telling old stories. It's not even, you know, like, you know,  
19 humor. It's got to have a purpose. And when BT doesn't even  
20 know who said it, it has all those same problems.

21 So I think I am on the same page as the Court, and I think  
22 that unfortunately, given what the Government has presented to  
23 the Court, you know, we are left with many, many, many unknowns  
24 as to who said these things, and I am very concerned, frankly,  
25 that between now and then, you know, the witnesses'

1 recollections may change, and so I don't know -- I think the  
2 Court just has to exclude those where it's clearly excludable  
3 now and the others, you know, we may just have to wait and see.

4 **THE COURT:** Right. Determining whether something is  
5 in furtherance of the enterprise -- I mean, that is still  
6 possible even if you don't know who said it, but if they said,  
7 "Well, let's go get the guns and the explosives and blow up  
8 this house," I mean, that --

9 **MR. NOVAK:** Context may inform that without knowing  
10 who the speaker is, but a lot of those in that area, 52 through  
11 64, sound like Mr. Nelson and Mr. Lyles, at least according to  
12 BT, who have been friends since they were children -- and  
13 that's not character evidence, Mr. Barry, that's just a fact.  
14 They've been friends since they were children talking about  
15 their experiences or something that happened. That doesn't  
16 mean they're statements made to move a criminal enterprise  
17 forward. And it's especially problematic where she doesn't  
18 know who said it.

19 **THE COURT:** Well, so --

20 **MR. NOVAK:** Because it wasn't --

21 **THE COURT:** -- taking an example, discussing of  
22 dealing weed.

23 **MR. NOVAK:** Which statement are you referring to,  
24 Your Honor?

25 **THE COURT:** No. 54.

1           **MR. NOVAK:** I've got a gigantic chart here.

2           **THE COURT:** I do, too. One of those double-chart  
3 things. NOVARTIS.

4           **MR. NOVAK:** Mr. Waggener taught me to use 11 by 17  
5 paper.

6           **THE COURT:** That's exactly what I have. And, by the  
7 way, that's how I'm going to issue the order, too.

8           **MR. NOVAK:** 54.

9           **THE COURT:** 54.

10          **MR. NOVAK:** That we use 11 by 17 paper?

11          **THE COURT:** Well, you are going to get it in digital  
12 form. You are going to have to print it out --

13          **MR. NOVAK:** Okay. 54.

14          **THE COURT:** "Lyles and Diaz discuss dealing weed."

15          **MR. NOVAK:** First of all, that's Lyles and Diaz.

16          **THE COURT:** Yeah. All right, well -- all right. 52,  
17 "Lyles, Nelson, others talk about dealing weed, cocaine,  
18 steroids."

19          **MR. NOVAK:** "Talked about." I mean, that doesn't  
20 really tell you anything. Is that some other person's current  
21 ongoing illegal controlled substances distribution or is it a  
22 member of the club who's going to share the proceeds with the  
23 club? It could be everything from completely meaningless to  
24 something that really is about the enterprise, and she doesn't  
25 know.

1           **THE COURT:** Let me get the Government's response to  
2 that.

3           **MR. KRISHNAMURTHY:** First, I think we also agree with  
4 the Court's framework which is it's either a party opponent  
5 statement if a witness can specifically identify the party  
6 opponent who said it. It's also possible if the witness hears  
7 people who are only co-conspirators talking about a subject in  
8 a way that advances the goals of the conspiracy, it can also be  
9 a co-conspirator statement regardless of which of a small  
10 subset of people said it.

11           With respect to specific statements, I mean, I think we  
12 put the grand jury testimony of BT in front of the Court as  
13 Exhibit F, and I know that we put a lot of paper in front of  
14 the Court, and so all this is -- is sort of hard to keep track  
15 of, but --

16           **THE COURT:** Exhibit F to which docket?

17           **MR. KRISHNAMURTHY:** I think it was our response to  
18 some motion in limine. I think it was Ms. Peng's declaration.

19           **THE COURT:** Okay. In response to this particular  
20 motion in limine?

21           **MR. KRISHNAMURTHY:** Correct.

22           **THE COURT:** Okay.

23           **MR. KRISHNAMURTHY:** The testimony in the grand jury is  
24 that BT did not identify specifically who said what during  
25 those conversations, and so that's accurate. But the question

1 and answer was, "Do you know if members of the HASC deal  
2 drugs," and she said, "Yes." "How do you know?" "Because I  
3 overheard these people talk to each other about dealing drugs."

4 So I think the inference there is they are talking about  
5 dealing drugs in a way that advances their goals of dealing  
6 drugs, which is one of the --

7 **MR. NOVAK:** Your Honor, if I might say one thing,  
8 Your Honor? We had a -- are there was a bunch of briefing on  
9 the question of whether any criminal activity by a charged  
10 member of the enterprise is sort of attributable to the  
11 enterprise, and I don't know that that briefing led to any  
12 particular ruling, but I think this is an example of where the  
13 parties differ on the admissibility of what Mr. Krishnamurthy  
14 just said just because, for example, if you go to 54 -- and I'm  
15 just going to use this as a hypothetical.

16 Let's say that Mr. Lyles and Mr. Diaz are talking about  
17 Mr. Diaz having sold some weed. Is that an enterprise  
18 activity, or does it depend on Mr. Diaz's, you know -- the  
19 relationship between Mr. Diaz selling weed and the -- and the  
20 enterprise? I mean, is every, you know, gram of marijuana that  
21 Mr. Diaz sells to somebody attributable to the enterprise no  
22 matter what? And there is no time, there is no context, there  
23 is no quantities, there is no who -- you know, there is nothing  
24 about the financing of it. It's just -- you know, it's -- I  
25 mean, we are beginning to hear over and over again that every

1 single act and statement proves the existence of the  
2 enterprise, and so we're sort of losing track of what is the  
3 enterprise and what's the core activity --

4 **THE COURT:** We have had this discussion, and I am  
5 still of the view that there has to be some kind of nexus.

6 **MR. NOVAK:** That's what I'm saying. I should have  
7 just said "nexus."

8 **THE COURT:** There's a personal act -- and I understand  
9 you're saying VICAR and RICO and all that. At the end of the  
10 day, still, somebody can do something that is totally personal,  
11 nothing to do with the enterprise, and that does not  
12 automatically demonstrate the existence of the enterprise.

13 I understand the Government's theory, but I'm not  
14 convinced. So the problem is, you know, if the witness  
15 testifies that what they or she or he heard sounded like a deal  
16 that concerned the -- the HASC, that somehow the HASC  
17 facilitated this, it was part of the deal of, some of the  
18 proceeds went to it, then obviously there is that nexus.  
19 Absent that nexus, then there is a problem about whether this  
20 is truly relevant or not.

21 **MR. NOVAK:** And that's a problem with the way the  
22 question was asked in the grand jury because the question is  
23 just, "Do you know anything about any member of the enterprise  
24 every selling dope?" Even the grand jury proceeding doesn't  
25 ask the nexus question.

1           **MR. KRISHNAMURTHY:** Well, Your Honor, just two points  
2 of clarification. One is that the grand jury testimony is  
3 actually Exhibit B to the Peng declaration, not Exhibit F. My  
4 apologies.

5           The second is if the Court looks up at statement 53, which  
6 is -- sort of immediately precedes that testimony, which is,  
7 you know, in the context of seeing other people sell drugs,  
8 while -- BT is also going to testify that Lyles told her that  
9 everything he does and all his money and resources and  
10 everything goes to the benefit of HASC and his brothers. So I  
11 think --

12           **THE COURT:** All right. So there is your predicate.  
13 There is your predicate for the nexus.

14           **MR. KRISHNAMURTHY:** Correct.

15           **MR. NOVAK:** I doubt that it's true, but I think that  
16 statement might be admissible.

17           **THE COURT:** Yeah.

18           **MR. NOVAK:** But that doesn't mean -- well, whatever.  
19 We will deal with the truth --

20           **THE COURT:** We have a framework. I mean, you know how  
21 I'm going to look at it, and if there is some evidence of a  
22 nexus that a jury could believe -- I don't say I have to agree  
23 with it, I don't say that it has to be greatly credible, but if  
24 there is some evidence that a jury could believe that provides  
25 that nexus, then it becomes enterprise evidence. If there is

1 no such evidence, then it fails. That's just how I'm going to  
2 look at it. So this was a useful discussion.

3 Let me ask, weapons-related evidence, there is a  
4 cumulativeness problem. I understand, you know, the argument  
5 about the ubiquity of weapons and use of weapons and firearm  
6 possession, and I think that -- I mean, sort of similar to the  
7 argument that we've had, although this one, you know, to the  
8 extent that there is going to be evidence of use of weapons and  
9 various things, I think the nexus is going to be a little  
10 easier to demonstrate. On the other hand, there is a concern  
11 about, you know -- and I don't know how many photographs and  
12 exactly -- because I haven't looked at the -- all the evidence,  
13 but at some point, there is going to be a problem of cumulative  
14 and unnecessary.

15 So I don't know what the Government is planning, but I  
16 think the Government should be aware that it ought to exercise  
17 some judgment and discretion in this because I'm just not going  
18 to let stuff come in by huge numbers just to prove a single  
19 point.

20 Racial animus. Now, I understand this is a hot topic that  
21 could be prejudicial. On the other hand, I think the question  
22 is whether the views that are depicted in some of those photos  
23 and in the rules is something that's kind of either  
24 institutionalized so that it is part of the enterprise dogma or  
25 whatever or something that is widely held so it's not just some



1 individual spouting off. And here there seems to be evidence  
2 that -- that this was widely endorsed, not only because of the  
3 number of photos but then there is the house rules about  
4 certain people being excluded, etc., etc., and it seems to me  
5 that evidence of the rules and the -- whether they are formally  
6 written or not of the organization is -- does go to the  
7 existence or not of the enterprise.

8 **MR. NOVAK:** Well, let me address that if I may,  
9 Your Honor, and I think there are a couple of different ways to  
10 cut this up.

11 First of all, the evidence of, quote, rules of certain  
12 ethnic groups that can't be members are, as I pointed out in  
13 the reply brief, documents found in other clubhouses, not in  
14 Sonoma, that are decades old. I mean, many decades. And I  
15 would ask the Court to look back -- and it's in my reply -- as  
16 to where they were found and the date on those documents. They  
17 were not current rules found in the Sonoma clubhouse. So I  
18 think that there's a -- there's a balancing issue there.

19 I would agree that if there is a photograph of a couple  
20 members, including one or more who are defendants, and behind  
21 them or on the vest that they're wearing are some lightning  
22 bolts on a sticker or on a patch, that's one thing because, you  
23 know, there are some things that some people might consider,  
24 you know, symbolic of intolerance that are integrated, you  
25 know, into patches or stickers, but that's very different from

1 an unknown person wearing a white robe and a hood with a noose.  
2 Like that has no role in this trial at all. That is just pure  
3 throwing stuff against the wall, you know, and hoping it  
4 splatters on the defendants. There is nothing about those  
5 photographs that has any role in this case at all.

6 And then I think there is a bunch of stuff in between that  
7 again, you know, like can you tie it to the people on trial,  
8 and so I think -- also let me just say one more thing, and then  
9 I will be quiet.

10 I don't think there are that many of these items, if the  
11 Court looks at the chart that I attached to the motion in  
12 limine on this. I think that we can deal with these as they  
13 come up with the exception of the ones that are at the  
14 extremes, like I just described.

15 **MR. GOHEL:** And --

16 **MR. NOVAK:** Does that make sense, Your Honor?

17 **THE COURT:** Yes. Let me hear the response.

18 **MR. NOVAK:** I think Mr. Gohel wanted to supplement.

19 **MR. GOHEL:** Can I add one thing? Sorry. I will try  
20 to be brief.

21 If the Government is going to go down the road of clearly  
22 trying to cherrypick a bunch of pictures and rules that suggest  
23 that these guys are racially motivated, then I'm assuming the  
24 Court is going to allow us to present evidence -- I'll just  
25 give a couple examples. There are several charters in Mexico,

1 there are several charters in Japan. That there are probably a  
2 significant minority of members in the Hells Angels who are of  
3 Hispanic origin, and we will seek to introduce this evidence in  
4 order to refute this -- this -- this allegation that the Hells  
5 Angels are some sort of a racist organization.

6 And also even if it's unpleasant, there is a First  
7 Amendment issue. If someone thinks that -- you know, whether  
8 it be lightning bolts or some sort of off color -- that might  
9 be not appreciated by most of society, there is still a First  
10 Amendment issue with a lot of these things. Like, we think  
11 this is, you know -- having old German -- German, you know,  
12 paraphernalia from World War II is shock value. So there is a  
13 First Amendment aspect.

14 But I do think the Court should be prepared that the  
15 Defense may seek to introduce a lot of evidence to counter this  
16 point if the Court will allow it because the Government is now  
17 suggesting that this is a racist organization, which is  
18 contrary to the actual evidence of the organization as it  
19 stands today.

20 **THE COURT:** All right. Let me hear from the  
21 Government.

22 **MS. McCLURE:** Your Honor, I may I say I join in the  
23 comments of my colleague. It's improper evidence --

24 **THE COURT:** All right. So I would like a response on  
25 the age of the rules and the idea that these are outdated and

1 no longer relevant and the notion that, you know, this is going  
2 to now invite for rebuttal.

3 **MR. BARRY:** Your Honor, the Defense can rebut the  
4 Government's case however they want. If they want to bring in  
5 evidence of who the Hells Angels are around the world, fine.  
6 We're fine with that.

7 Now, the issue here -- and with respect to the First  
8 Amendment issue, the defendants, the Hells Angels can say  
9 whatever they want, but this is what they've said. This --  
10 these -- this is how they identify themselves. In fact, it's  
11 important that -- I'm glad Mr. Gohel brought up the First  
12 Amendment because association -- the right of association in  
13 the cases that I cited includes shared ideals and shared  
14 concepts, shared beliefs.

15 **THE COURT:** I'm not as concerned about the First  
16 Amendment in this context. What about the age, using evidence  
17 of something that is old from a different clubhouse that has  
18 nothing to do with the HASC and is decades old?

19 **MR. BARRY:** Your Honor, I would direct Your Honor --  
20 the Court to TC's grand jury testimony that was submitted in  
21 conjunction with the 104 hearing, and my recollection is that a  
22 black female prosecutor asked TC, the insider, whether someone  
23 like her could be a member, and my recollection is no, the  
24 answer is no, you can't because black people don't get in. I  
25 anticipate that every Hells Angels insider that we -- that we

1 bring to the stand will indicate that black people cannot be  
2 Hells Angels in this particular -- particularly of this charter  
3 because this is the charter that we are dealing with. The  
4 enterprise is confined to Sonoma County. So it will be  
5 current. It will be active. And the current posture is  
6 consistent with the historical posture.

7 The -- and the -- the idea that, you know -- that someone  
8 dressed in a KKK outfit is no connection to the defendants,  
9 that's absolutely not true. I mean, our motion showed that in  
10 that we have people at a Sonoma County Halloween party dressed  
11 up in KKK outfits, and we have Mr. Hefferman from Fresno in the  
12 Fresno clubhouse with a KKK hood and a whip. And I'm sure that  
13 the Defense is going to argue strenuously that each charter is  
14 completely independent and there is absolutely no indication  
15 that anybody in Fresno is connected with Sonoma County in any  
16 way, and here is direct evidence of a shared ideology, a shared  
17 ideal.

18 And the -- as we argued, the Defense can't say that if we  
19 pick apart ideals in our First Amendment rights to hold them --  
20 if we pick these ideals, the jury can't hear about it because  
21 they're going to be mad at the ideals that we pick for  
22 ourselves.

23 **MS. McCLURE:** Your Honor, not a single crime in this  
24 case is alleged to have been racially motivated. There has to  
25 be --

1           **THE COURT:** That doesn't end the inquiry.

2           **MS. McCLURE:** It doesn't end it, but, Your Honor, this  
3 is highly inflammatory evidence that is not probative.

4 Minimally --

5           **MR. BARRY:** These are the symbols that this  
6 organization --

7           **THE COURT:** Hold on. I've heard enough. Let's move  
8 on.

9           Text messages from Fonteno to Ms. Maras. Were these after  
10 the beating of -- alleged beating of Joe Fats?

11           **MR. KRISHNAMURTHY:** Yes, Your Honor. There has  
12 actually been a narrowing of this -- of the dispute for this  
13 issue just because we withdrew a couple of these text messages  
14 in our most recent supplemental chart. So we ended up  
15 withdrawing all of the 6/29/15 text messages and then the  
16 3/6/15 text message, which is number 307. So I think the only  
17 text messages that are at issue are the 4/15/15 text messages  
18 which are all at or around the time of the assault.

19           **THE COURT:** What do they say?

20           **MR. KRISHNAMURTHY:** So in -- so for the exhibit that  
21 the Defense submitted, those are numbers 205 to 259 -- sorry --  
22 250 to 259, and basically they explained to the girlfriend that  
23 because she and the member in Sacramento violated the rules, he  
24 is going to be kicked out of the club. She is going to have to  
25 talk to all of Fonteno's boys in a room which we think is an

1 inference to the members of HASC at the clubhouse. And that  
2 she is going to be prohibited from speaking with any members of  
3 the Hells Angels after the next Hells Angels officers meeting.

4 **THE COURT:** All right. What's the response?

5 **MR. NOVAK:** I think that if it was just those three  
6 statements, then we may have reached the end of the discussion,  
7 but I think that there are more than just those three, and  
8 maybe I need to look at what Mr. Krishnamurthy is saying  
9 because in our reply when we acknowledged that the Government  
10 had cut some out, I feel like there was still a large quantity  
11 of Mr. Fonteno threatening this woman which, of course, has  
12 nothing to do with the enterprise. That's about their  
13 relationship and the way he responded to it.

14 So if what Mr. Krishnamurthy is saying is it's only 250  
15 through 259 inclusive, I can look at those again. As I  
16 recall --

17 **THE COURT:** Your objection is the threats to her, that  
18 appears to be personal and arguably doesn't further the  
19 enterprise unless he's implementing some rule of the enterprise  
20 like you can't come to a meeting anymore or you can't talk or  
21 whatever?

22 **MR. NOVAK:** Yes. And I also think that -- and I think  
23 that Mr. Krishnamurthy would agree with this -- that there are  
24 some texts which are a mix of both of the two things that the  
25 Court just said. And so it may be that a couple of those texts

1 are partially admissible and partially need to be redacted.

2 **THE COURT:** All right.

3 **MR. KRISHNAMURTHY:** Your Honor, one note on that. Our  
4 position is also these are sort of rapid-fire texts all coming  
5 in the course of one night. If there is one text with a threat  
6 against Ms. Maras that doesn't mention the club and the second  
7 threat that follows immediately after it that says you're going  
8 to be 86'd from the Hells Angels, our position is that  
9 entire -- the entire course of that conversation is invoking  
10 the Hells Angels to impose consequences on her for violating  
11 club rules.

12 **THE COURT:** Well, why don't we do this. Mr. Novak,  
13 why don't you look at 250 through 259, and if there is an  
14 update in your position, let me know.

15 **MR. NOVAK:** Of course.

16 **THE COURT:** Let me know by Monday because I want to  
17 start ruling on this stuff. If there is not, then I'll rule.

18 Let me address this question about procuring legal service  
19 for the defendants and use of attorneys that comes up in a  
20 couple of different places. You know, if the -- if there's  
21 evidence of that -- that the club procured legal services, then  
22 that is arguably evidence supporting the existence of an  
23 enterprise because it shows, you know, a group activity or  
24 associational activity. I think that's different from the fact  
25 that, for instance -- and I don't know what the evidence is



1 going to be and obviously we are not going to have any names.  
2 That's a given.

3 That if several members happen to use on their own dime  
4 the same attorney, I'm not sure that's very probative. I don't  
5 know if that's going to be the evidence or if it's going to be  
6 more evidence that there was a fundraiser, defense fund raised  
7 by the club for so and so, or there is a case that somebody  
8 served as general counsel, you know, sort of by the club or by  
9 the organization -- but I do see a distinction between sort of  
10 organized active, organized retention of counsel, and the fact  
11 that people happen to use the same attorney.

12 **MR. BARRY:** This is Kevin Barry, Your Honor.

13 So just one point -- well, two points on that.

14 There is -- there has been -- there is evidence that some  
15 associates were directed to use a specific attorney. In fact,  
16 one of the witnesses that the Court excluded -- and this is --  
17 this goes back to a question that, you know, the Court has like  
18 *Why do you need this? You've got so much evidence*, but I think  
19 the Court doesn't necessarily appreciate the impact that the  
20 prior orders of exclusion have had on the Government's case.

21 So we had a witness who was directed to hire a specific  
22 attorney for a criminal case. The person did, and the person  
23 didn't pay this person in the right way or didn't contact them  
24 quickly enough, wasn't following up, and Nelson assaulted this  
25 associate because of that. And so it's direct enterprise

1 evidence of -- related to having, you know, a house lawyer  
2 working.

3 So the president directed this person to do something, to  
4 retain counsel, and punished him for not doing so in the way  
5 that Nelson thought was appropriate. And the testimony from  
6 that witness won't come in. The testimony about that may come  
7 in if other people knew about it, but that's sort of -- you  
8 know, there are consequences when the Court says *you don't need*  
9 *this* or *you might not need this* or *it's cumulative*. The Court  
10 doesn't necessarily appreciate how things fit together in the  
11 Government's case.

12 So we do anticipate that there will be evidence along  
13 those lines, that -- that there were directions to use  
14 particular attorneys, there were attorneys that were known as  
15 club lawyers, there were attorneys who gave updates on other  
16 criminal cases by -- by members, and, in fact, the Court heard  
17 this testimony by Victim 5 way back in the -- one of the  
18 ex parte filings in that there were updates about other  
19 members' criminal cases in church by at least one lawyer.

20 Another -- a lawyer provided sort of impromptu lessons on  
21 how to beat or how to address a firearms case to a member. So  
22 that's the kind of thing -- that's the kind of evidence that we  
23 anticipate coming through.

24 And I agree with the Court, that it is directly relevant  
25 to enterprise evidence.

1           **THE COURT:** Because that's organized activity. If  
2 somebody goes to church and gives a lecture on something,  
3 that's not just somebody retaining somebody and somebody else  
4 retaining -- happening to retain that same person.

5           **MR. BARRY:** Yes, Your Honor.

6           And an additional wrinkle, like, this isn't the case where  
7 someone had -- let's say someone was directed to a particular  
8 lawyer to handle all their personal injury matters, and it just  
9 so happened that everyone used, you know, Bob Smith, the  
10 personal injury lawyer.

11           This is criminal activity committed by Hells Angels  
12 members in Sonoma County who are directed to or share the same  
13 kind of lawyers, showing that they knew that other members  
14 would commit criminal activity, and therefore it informs  
15 whether there was an agreement among the people in the  
16 enterprise that some members would commit racketeering acts.

17           **THE COURT:** All right. Let me hear briefly any  
18 response to that.

19           **MR. PHILIPSBORN:** Your Honor, Philipsborn for Wendt.

20           When I was first in this case, I forewarned the Court that  
21 this was coming down the pike, and so I'll stand on the -- on  
22 the arguments that we've made in writing.

23           But the extent to which this kind of evidence tars the  
24 lawyers who are representing the accused in the courtroom  
25 cannot be underestimated, so I'm assuming that the Court is

1 going to be prepared to instruct the jurors that all of the  
2 accused in this case have appointed counsel and that whatever  
3 evidence the Court admits over objection, that the -- that an  
4 instruction will minimize the prejudice to those of us who are  
5 representing our clients in the courtroom.

6 I just think that there is -- the return on the  
7 Government's investment for this kind of evidence is minimal.  
8 And having been involved in cases in the Second Circuit in  
9 which these issues come up, they don't come up because some guy  
10 repeatedly represents somebody in an alleged, quote/unquote,  
11 crime family.

12 And I -- and -- my experience has been the trial courts  
13 are very concerned, the district judges are very concerned  
14 about the effects that this kind of evidence will have on the  
15 lawyers and the clients who are facing prosecution in the case  
16 at hand. I would just ask the Court to consider those matters.

17 Submitted.

18 **MR. GOHEL:** Your Honor, can I add this is another area  
19 where we're going to have to open up a whole bunch of things to  
20 refute this evidence. We could get into evidence of what  
21 actually happened as opposed to what some informant from the  
22 Government claims happened with respect to attorneys who  
23 supposedly gave symposiums at church, which their own expert  
24 says no one goes to church other than members so it's a little  
25 interesting that they've got a witness saying that there is

1 lawyers appearing at church.

2 And, you know, they -- perhaps the reason people use  
3 lawyers is because they get good results. You have police  
4 unions that use the same lawyers. Every single police  
5 defendant in a criminal case in the Bay Area has a handful of  
6 attorneys, maybe one or two, that are always used. And I could  
7 argue that some police agencies might be RICO enterprises as  
8 well. But I would suggest to the Court that we are going to  
9 open up a can of worms, and I cannot agree more with  
10 Mr. Philipsborn that there is going to be a pallor put on all  
11 of these advocates. I'm going to except myself from this  
12 group, but the other five fine attorneys are going to be in  
13 this case and they're going to be painted with this, and the  
14 only reason the Government is doing this is to tarnish the  
15 attorneys for the Hells Angels and to drag them down with this  
16 because they don't need this evidence. They have plenty of  
17 other evidence of the existence of an enterprise.

18 So I would submit to the Court this is really dangerous  
19 territory and a dangerous precedent. And these men are on  
20 trial for their lives, and their lawyers are going to  
21 besmirched by this very minimally probative evidence that is  
22 going to be presented that it's going to take a long time to  
23 refute.

24 **THE COURT:** All right. I'm going to move on. Thank  
25 you.

1           Testimony of BT and Mertz about lay opinion based on  
2 speculation. To me that -- I've got to hear exactly what the  
3 basis -- whether there is a sufficient foundation laid about  
4 whatever they're going to talk about. If this is information  
5 that is received, you know, by their own personal observations,  
6 that's one thing. If it's based solely on what one person told  
7 them, it seems to me that's something else. And I don't know  
8 what exactly the testimony is going to be.

9           But if BT -- if all of BT's testimony is just based on  
10 what was told and not actual observations or overhearing group  
11 conversations, this sort of thing, it just seems to me that's  
12 problematic.

13           Let me --

14           **MS. PENG:** Yeah. I think both the grand jury  
15 testimony of SM and BT have been submitted to the Court, and I  
16 would submit that their grand jury testimony is not the  
17 entirety of the foundation that could potentially be laid, but  
18 just briefly on what the foundation would be, SM was best  
19 friends with Victim 1 for about 15 years, both before and after  
20 he joined the Hells Angels, and he actually himself personally  
21 hung around the Hells Angels and considered himself a friend of  
22 the club. So he -- there is sufficient foundation for SM to  
23 testify regarding that particular relationship.

24           And BT, as Your Honor has already heard a little bit about  
25 today, was the old lady of Russell Lyles for about five years,

1 and so she was in an intimate relationship with him and  
2 observed, as demonstrated through some of the co-conspirator  
3 statements, precisely the types of conversations and  
4 experiences that she personally overheard and saw.

5 And so I think with that basic foundation, it's sufficient  
6 for these witnesses to testify, and any other objections as to  
7 foundation or credibility can be addressed through  
8 cross-examination.

9 **THE COURT:** All right. Response.

10 **MR. GOHEL:** Your Honor, with respect to SM --

11 **THE COURT:** Yes?

12 **MR. GOHEL:** -- my understanding is that all the  
13 information that he received, any statements he got and his  
14 knowledge about the Hells Angels, at least from the discovery  
15 that I've seen, came from the -- the alleged decedent in this  
16 case, Mr. Silva. I don't know if they're saying that Mr. Silva  
17 is a co-conspirator. I don't know what, you know -- but it's  
18 based on hearsay. It is -- it is not in furtherance of any  
19 conspiracy. And -- I don't know. I just don't think there is  
20 adequate foundation, especially since he -- he received, you  
21 know -- that's the only person that he was supposedly tight  
22 with. And I think all the statements are attributable to  
23 Mr. Silva supposedly telling him things about the Hells Angels.

24 **THE COURT:** Well, it's been represented that he  
25 also -- this person, this witness, hung around the clubhouse,

1 got to know the members, went to other chapter clubhouses,  
2 including Vallejo, so it's not just one conduit.

3 **MR. GOHEL:** Well, your Honor, the problem with this is  
4 the Government's whole theory is everything from the  
5 stitched -- you know, the stitched skull that their expert is  
6 going to testify to, that this is a secret organization, that,  
7 you know, people don't talk about club business, they are going  
8 to introduce evidence about that, and then all of a sudden  
9 there is a person of -- not even at the level of what you call  
10 a "hang-around," is just some friend, all of a sudden has this  
11 deep, intimate knowledge about the inner workings of the Hells  
12 Angels to the degree that the Government -- the United States  
13 government wants to put them on as a lay expert opinion when  
14 they already have an expert that they're going to have testify  
15 about the organization. So I think there is serious foundation  
16 problems and I think that we should get a hearing on what the  
17 basis of --

18 **THE COURT:** Let me ask the Government, give me an  
19 example of the opinion, lay opinion that SM is expected to  
20 give.

21 **MS. PENG:** I think that, you know -- for example,  
22 based on his relationship knowing Mr. Silva before and after he  
23 joined the club, his personality changed, as one example, and  
24 that is not based on a hearsay statement. That is based on him  
25 being friends with Silva for over 15 years and interacting with



1 him and describing him as a best friend. That is precisely the  
2 type of testimony that is permissible under Rule --

3 **THE COURT:** Is he going to give a lay opinion with  
4 about the HASC?

5 **MS. PENG:** I think he is -- so in terms of the  
6 foundation, he's going to give an opinion regarding his own  
7 experiences. True, he's not a member. He is not a prospect,  
8 but that doesn't mean that he is not permitted to have an  
9 opinion based on what he perceived.

10 **THE COURT:** I'm asking what is that opinion? He can  
11 testify about what he saw, what he heard, what he witnessed.  
12 That's percipient. Is there going to be an opinion from him  
13 about the HASC?

14 **MS. PENG:** I -- you know, I'm not sure precisely what  
15 that opinion is going to be, but -- because, you know -- I  
16 think I would direct the Court to his grand jury testimony at  
17 this point. I do think that he will have opinions regarding  
18 Mr. Silva and his perception of what he was like before and  
19 after he associated with the club.

20 **THE COURT:** All right. Well, that will have to wait  
21 until trial and see what -- what happens there.

22 I've got to move on because it's now about an hour and a  
23 half and the procedural stuff that's been raised by Mr. Ott  
24 we'll address -- we'll address at the pretrial conference.

25 Let's see. All right. With respect to reference to

1 the -- to the Hells Angels as a motorcycle gang as opposed to a  
2 club, I guess, what's -- what is the Government's response? Is  
3 there a problem here of not using the term "gang," just using  
4 the term "motorcycle club"?

5 **MR. BARRY:** Well, Your Honor, the Court already ruled  
6 on this. I mean, the Court has Jeremy Scheetz -- basically his  
7 direct testimony in the form of that lengthy declaration. He  
8 uses the term "outlawed motorcycle gang." In fact, he's  
9 probably going to use "OMG" for the vast -- overwhelming  
10 majority of times he is going to talk about it. I mean, that's  
11 the nomenclature he uses.

12 Every single case that the Defense cited for *oh, you can't*  
13 *use the word gang* is from a non-RICO case. The issue is does  
14 this constitute it? And if the -- if the words used and the --  
15 the -- the enterprise itself refers to themselves as outlaws,  
16 the one percenters. And that's the right nomenclature.

17 In fact -- like, this issue comes up sometimes in  
18 felon-in-possession cases where the defense says *oh, you*  
19 *shouldn't use the word felon*. Well, it's a handy shortcut. So  
20 "OMG," "outlawed motorcycle gang," those are the words that are  
21 used time and again.

22 We're not going -- we are -- we've used reference to  
23 "enterprise." If the defense wants to use "club," they want to  
24 question everybody about club, that's fine, but especially with  
25 respect to Mr. Scheetz, it's going to be "OMG," "outlawed

1 motorcycle gang" because that's the term he has used, and the  
2 Court has already blessed this.

3 **THE COURT:** Well, if he uses it, though, is it  
4 necessary for that term to be used repeatedly throughout the  
5 trial by others who aren't giving that expert testimony? In  
6 his case, it has some legal significance. That's why he is  
7 using that term.

8 **MR. BARRY:** Well, actually not even legal  
9 significance, Your Honor. I would put it that it has got  
10 operational significant for him because that's what he does,  
11 that's what who he studies. But, yeah, I don't know what other  
12 witnesses are going to be referring to it as anything other  
13 than -- other than a club.

14 But this administrative motion that you can't refer to it  
15 as X, if that's something that a person uses, I think is --  
16 it's unwieldy and it's improper, especially in the RICO context  
17 because that's what's at issue.

18 **THE COURT:** All right. I will take any brief comment  
19 on that, if any.

20 All right. Let me make a comment about testimony about  
21 personal drug use. It seems to me that testimony from a  
22 witness about, for instance, Mr. Ott's use, to the extent it is  
23 about telling people to do certain things, giving demands and  
24 directives and commands to prospects and stuff, I've already  
25 indicated that that may be relevant to the sort of hierarchy

1 and the structure and the existence of the enterprise, but if  
2 it's just testimony about use in the presence of the witness to  
3 show that they were close or, you know -- I understand there is  
4 that case that says that, the *Johnson* case, but that seems  
5 pretty weak.

6 I mean, you can demonstrate the length of a relationship  
7 between the witness and the defendant, I assume, through many,  
8 many other pieces of evidence. If somebody had known -- if  
9 they've known each other for decades or many years, there is  
10 many ways to show that they're close other than saying *and I*  
11 *saw him use drugs*. So I see a distinction there. Directives  
12 to subordinates, yeah, I could see it, but just observing, if  
13 that's going to be the testimony, in the privacy of two people,  
14 pretty weak.

15 **MR. KRISHNAMURTHY:** Yes, Your Honor. I can address  
16 that.

17 The first is I think especially with respect to Mr. Ott's  
18 motion, I think the testimony will be in the form of a  
19 directive, that someone, a prospect was directed to go procure  
20 drugs for Mr. Ott. Secondly, I think the Court has heard  
21 variants of this argument before, even some today, which is  
22 because these witnesses weren't part of the club, because they  
23 were only prospects, because they were only hang-arounds,  
24 because they were only friends of the club, they didn't  
25 actually know anything that was going on, they weren't actually

1 close to any of these members, and I think this is another  
2 brick in showing that connection. So with that I'll submit.

3 **THE COURT:** All right. Well, let me go on to some of  
4 the other matters. The hour is getting late here.

5 The Guardado homicide. I understand that that's to show  
6 these conflicts and territorial fights that is part of what  
7 the -- HA and the HASC is about because this is one example of  
8 that. What's -- what's -- it's just a 403? I mean, it seems  
9 relevant. Is the argument that this is so old that --

10 **MR. GOHEL:** Your Honor, I could be wrong, but the  
11 Court specifically -- and I think we put it in our papers. The  
12 Court specifically excluded this incident as part of  
13 Mr. Scheetz' testimony. Now, if this evidence is going to be  
14 introduced through some other manner, I guess through the court  
15 records of the conviction of the person that killed  
16 Mr. Guardado, I do think that there is a 403 problem, and here  
17 is why.

18 You have a little -- I mean, lets -- I will call it a  
19 little bar fight. Maybe it could be -- a bar fight that's  
20 going to be proven up by the Government that was already  
21 litigated, went to trial, went to verdict with a pretty -- as  
22 minor a slap on the wrist as you can get given what the  
23 allegations were. And in that case, the co-defendant --  
24 actually, the instigator of the particular incident was  
25 allegedly Mr. Guardado and during the pendency of that -- of

1 that proceeding, criminal proceeding, Mr. Guardado was killed,  
2 unfortunately, by supposedly by Mr. Ablett, which is the  
3 subject of a federal prosecution.

4 And just as the court excluded in the state court case --  
5 and I'm not saying that's binding on this Court -- you know,  
6 that kind of evidence is pretty -- is pretty prejudicial to my  
7 client, who is the person who was involved in that fight, ended  
8 up getting a conviction for a misdemeanor battery because I  
9 think that, you know, the jury finds out oh, he's in a fight  
10 with a guy who gets killed by a rival gang member during the  
11 case and it sort of elevates the whole thing, and I think it's  
12 extremely prejudicial to the proof of that incident. I'm not  
13 sure what the -- the relevance of it is other than that. The  
14 fact that he was -- Mr. Ablett was prosecuted for that murder  
15 and that there was a conviction. But the Court did exclude  
16 that particular incident as it related to Mr. Scheetz'  
17 testimony, and it was in the Court's ruling.

18 **THE COURT:** All right. But you're saying -- your  
19 client -- I didn't understand this. Your client was -- there  
20 is going to be testimony implicating your client in this  
21 incident?

22 **MR. GOHEL:** No, no. So -- so there -- there is going  
23 to be -- one of the overt acts is a 2008 bar fight in which  
24 Mr. Guardado, who was killed during the pendency of that case  
25 separate and distinct -- just totally -- he was killed by

1 Mr. Ablett, and I believe that the evidence that my client  
2 is -- is with someone in a bar fight which was, I believe, a  
3 relatively minor incident, and that during the pendency of that  
4 case, Mr. Guardado was killed by a rival -- you know, rival  
5 alleged gang member, I think it's -- it's confusing, it -- it's  
6 irrelevant, and I think it has a tendency to -- to sort of  
7 spill over onto my client, that he is sort of hanging out with  
8 someone who gets killed by a rival gang member during the  
9 pendency of a case. The two cases are not related.

10 **MR. WAGGENER:** And this was a motion raised by Mr. Ott  
11 in terms of the prejudice.

12 The answer to the Court's question is yes, it's 403  
13 argument. Bringing in evidence of an unrelated homicide not  
14 having to do with HASC that, you know -- so this Mr. Guardado  
15 had a relationship or friendship, whatever, with some of the  
16 HASC members. The fact that he is killed by a rival gang  
17 member is just -- just injects a whole other level of prejudice  
18 into this case and -- and other evidence of violent conduct and  
19 all kinds of different readings.

20 **THE COURT:** Let me ask the Government, is there going  
21 to be evidence introduced that Guardado had some kind of  
22 relationship with HASC members?

23 **MR. BARRY:** Absolutely, Your Honor. He was quite  
24 close to a number of HASC members.

25 The indictment specifically alleges that violence against

1 rival gang members, including the Mongols, is -- is one of the  
2 issues that animates the enterprise. This is not spillover.  
3 This is direct evidence of the enterprise. We're not going to  
4 have a mini trial on it.

5 The way we are going to introduce the Guardado homicide --  
6 and it wasn't, you know, an alleged murder by a Mongol. He was  
7 convicted of that in this courthouse. So what we -- we -- the  
8 way we're going to introduce it, it won't be a mini trial. We  
9 are going to have the court documents introduced, and then we  
10 will have insiders, HASC insiders talk about how profoundly  
11 that murder affected the enterprise. It had a dramatic impact  
12 on HASC members because he was a Hells Angel. He was very  
13 close with Sonoma County. He was murdered just miles away from  
14 their territory, and he was murdered by a Mongol, so that put  
15 the -- that put the Sonoma County Charter in particular on high  
16 alert. And you see that in the Livermore road rage incident in  
17 that the photographs of that -- of that incident show that just  
18 days later, the Hells Angels were riding around with knives all  
19 over their motorcycles, they had three weapons, three firearms,  
20 in their saddlebags. So they were on alert, they were worried  
21 about the Mongols, and they were ready to go to war because of  
22 this incident. It's central enterprise evidence.

23 The fact of the murder and who committed it will be  
24 introduced in about five minutes, so there won't be a mini  
25 trial. And, again, it has -- it goes to the core of what HASC



1 was all about, specifically violence against rivals, and the  
2 fact that murder was possible because Mongols had murdered one  
3 of theirs and they might have to do the same.

4 **MR. GOHEL:** Your Honor, if that's the case, since now  
5 the Government -- because I did think the Court excluded this  
6 specific incident from the testimony of Mr. Scheetz, then we  
7 have received no discovery from the Ablett prosecution so we  
8 are going to be making a request for all of the discovery from  
9 the Ablett prosecution which I believe also included discovery  
10 from a Mongols Central District prosecution. We don't have any  
11 of the discovery from that case. So in order to defend it, we  
12 are going to be making a request for that discovery because  
13 now -- this is the first time that they've articulated this  
14 theory that they are going to introduce this for this purpose.

15 **MR. BARRY:** Your Honor, these items, the conviction  
16 documents, are specifically identified in the exhibit list.  
17 That's what we're going to get into. If they -- in their  
18 rebuttal case, if they want to try to prove that it wasn't  
19 Mongol related, they're welcome to do that. They are welcome  
20 to waste all the time they want on that. But the point is this  
21 was a Hells Angels close to the Sonoma County enterprise that  
22 was murdered by a Mongol, and it had a huge impact on the case.  
23 So in order to --

24 **THE COURT:** How does the Government, other than the  
25 face of the conviction -- how is the Government going to

1 demonstrate that this was part -- this murder was a rival gang  
2 murder and not just a personal or some -- some kind of  
3 one-on-one?

4 **MR. BARRY:** It was -- it was -- he was convicted of  
5 VICAR murder with the allegation that he was a Mongol attacking  
6 a Hells Angel.

7 **THE COURT:** Okay. Well, so why should the Government  
8 have to then produce anything else? You've got the face of the  
9 conviction of a VICAR. That demonstrates a gang relatedness.  
10 If you want to rebut it, I understand that, but what obligation  
11 does the Government have to go beyond the face of that  
12 conviction?

13 **MR. GOHEL:** Well, because they have -- what happens in  
14 that case and what the conviction was for VICAR, this is being  
15 alleged as a -- to support a RICO enterprise in this case. So  
16 we need -- we need all of the evidence that comes from that  
17 case with respect to what actually happened, what the -- what  
18 the evidence was that was presented because I don't believe  
19 just the conviction in and of itself is going to be enough for  
20 us to be able to rebut that -- that claim, to show that in this  
21 case, this was not a RICO --

22 **THE COURT:** The factual issue as posed by Mr. Barry is  
23 whether or not that then is related to the HASC because of the  
24 closeness of Mr.-- of the victim, Mr. Guardado, and the HASC  
25 and putting the HASC, quote, on high alert, close quote.

1 I mean, you can hear what the evidence is going to be in  
2 that regard. I guess he is going to have some witnesses talk  
3 about the -- where they road and with the firearms and stuff,  
4 and you'll have the ability to counter that or try to cross on  
5 that. I don't understand why the documents and the evidence in  
6 the Guardado case itself has any particular bearing on the  
7 reaction --

8 **MR. GOHEL:** Your Honor, there could be all kinds of  
9 evidence in that case. We don't have possession of it. The  
10 Government does. There could be all kinds of evidence in that  
11 case that might refute the idea that Mr. Guardado was close to  
12 the Sonoma Hells Angels. I don't know. I don't know what it  
13 is. But I think that we're entitled to it. If we have to,  
14 we'll file a motion.

15 **MR. BARRY:** Well, Your Honor, I'm not sure that the  
16 concept of a fishing expedition has been more clearly put than  
17 right there. *We don't know what's there. We want it. We need*  
18 *it, but we don't know why we need it, and we don't know what it*  
19 *could be, but we want it, and we're going to file a motion for*  
20 *it.*

21 **MR. GOHEL:** I'm assuming the Government has looked  
22 through all the evidence in that case and that there is no  
23 *Brady* materials in there and there is nothing that would refute  
24 any of the elements or the purposes for which the Government is  
25 introducing this evidence --

1           **THE COURT:** That's a fair comment. If there is *Brady*  
2 evidence that tends to negate the theory you just articulated,  
3 Mr. Barry, then you would have to produce that. If there  
4 isn't, there isn't.

5           **MR. BARRY:** Yeah. I don't know how there could be  
6 *Brady* material, Your Honor. What we're introducing is the fact  
7 that will Ablett was charged with VICAR murdered and was  
8 convicted of it and the victim was Mark Guardado, and then we  
9 are going to have HASC insiders talk about the impact that that  
10 murder had on them, and they are going to talk about what they  
11 knew about the prosecution, too. That's it.

12           We are deliberately not trying to get into a mini trial  
13 because it's not that -- it's not core, it's not an allegation  
14 that this charter did anything wrong, but it has to do with how  
15 this charter was -- how they constituted themselves and how  
16 they viewed themselves with respect to the Mongols.

17           **MR. GOHEL:** Your Honor, the charged enterprise here is  
18 the Hells Angels Sonoma County, so the fact that there is some  
19 rivalry between -- or there was a VICAR a Mongol shooting or  
20 killing Mr. Guardado, who was a San Francisco Hells Angel -- if  
21 there is evidence in their -- in their files that may undermine  
22 the connection that this is a Hells Angels Sonoma County --  
23 supports that this was a Hells Angels Sonoma County -- or  
24 supports of the idea the enterprise was Hells Angels Sonoma  
25 County, I think the Government has an obligation to review it

1 and to disclose any *Brady* materials, at the very least.

2 **MR. WAGGENER:** Or it could be an independent conflict  
3 with the San Francisco Charter as opposed to the HASC, and  
4 there is no link there --

5 **THE COURT:** Well, what's relevant is what the reaction  
6 was. I mean, it has little relevance except for the connection  
7 that Mr. Barry has indicated, that because of his friendships  
8 and his closeness with the HASC, that then spurred the HASC to  
9 go on high alert and take certain precautionary actions.  
10 That's -- and you can rebut that evidence. I don't think that  
11 comes from the Guardado case itself because it didn't -- from  
12 what I understand, it has nothing to do with the HASC and the  
13 connection to the HASC had nothing to do with that case.

14 Now, obviously if there is something in there that says he  
15 had nothing to do with the HASC and didn't know the HASC and  
16 that undermines your insider testimony, yeah, that would be  
17 *Brady*, but I -- I'm not sure why that would exist in that case  
18 so that doesn't seem to be an issue.

19 **MR. PHILIPSBORN:** Your Honor, Philipsborn.

20 Mr. Guardado was killed in September of 2008 and outside  
21 of a bar in the Mission. The defense was self-defense, and as  
22 Mr. Barry would not argue, it obviously didn't work because he  
23 was convicted of VICAR murder, but the circumstances of the  
24 offense -- I mean, I won't belabor it. You've heard the  
25 arguments from Mr. Gohel, but the point is, I do think that

1 once one understands that the Guardado situation is -- really  
2 has an attenuated relationship, both to the charged overt act  
3 in this case and also potentially to HASC, it does make sense  
4 that we would ask for the Government to review that case file  
5 to make sure that there isn't anything in there that is *Brady*.

6 **THE COURT:** And what is *Brady* would be something that  
7 would undermine a nexus -- the asserted nexus to the HASC, that  
8 this is event spurred action by the HASC as a group, not what  
9 happened at the murder and what -- did it really happen, was  
10 the conviction justified, and all that sort of stuff. It's the  
11 aftermath that is the point. If there is something in that  
12 file that tends to show that there was no aftermath, there was  
13 no connection to the HASC, yeah, that would be -- that would  
14 seem to me to be *Brady* information because that would  
15 contradict the Government's theory of the case as it just  
16 explained to me.

17 **MR. BARRY:** Your Honor, what we'll do is we will talk  
18 to the case agents, and I am -- I am confident that there will  
19 be nothing along those lines because there were no common  
20 witnesses. The -- our insiders had nothing to do with that,  
21 but they were affected by it, and they did know about it  
22 because it was a great topic of discussion.

23 **THE COURT:** All right. Let's move on to the next one.  
24 The C.A.S.T. stuff. I'm not going to revisit the C.A.S.T.  
25 stuff except there is an issue I can see brewing here about a

1 demonstrative which if it's a demonstrative, it can be subject  
2 to cross-examination if you think that something's not accurate  
3 or if it's -- depicts something -- exaggerates something, but I  
4 think it's -- of more concern if the Government wants to  
5 introduce this as an actual exhibit under 1006 and that goes  
6 back to the jury room. And all I can say is, you know, number  
7 one, it's going to have to comply with all the requisites of  
8 1006; and, two, I would scrutinize it more closely because if  
9 there is something inaccurate about it that is arguably  
10 prejudicial, I would be very much inclined to exclude it as  
11 evidence. I can allow it as a demonstrative as part of the  
12 testimony but once you give it the stature of evidence --  
13 summary evidence is supposed to be summary. It's supposed to  
14 be you dry; not argumentive, not -- you know, it's supposed to  
15 be, you know -- it's pretty much straightforward, so I have my  
16 doubts about 1006, but I'll reserve that until I see it.

17 All right. Why don't I get to Mr. Wendt's motions.

18 **MR. BARRY:** Sorry to interrupt, Your Honor, but did  
19 the Court address the motion, I think by Mr. Nelson, about  
20 excluding evidence that witnesses are in fear?

21 **THE COURT:** Well, I have that. I don't know if I need  
22 to hear much. If you want to make a brief comment about that,  
23 I will hear it.

24 **MR. BARRY:** Yeah. In fact, Your Honor, this relates  
25 back to the -- the issue of the sex assaults as well in that

1 the -- the issue is going to be whether -- if the Defense is  
2 going to challenge witnesses for bias, one of the reasons that  
3 people are afraid is because of what the enterprise -- members  
4 of the enterprise already did to them.

5 So, for instance, like the reason that MJ will be afraid,  
6 that reason that BT took some of the steps she did were because  
7 of what had happened, and the Defense is going to argue -- I  
8 imagine they're going to argue or cross-examine that *nothing*  
9 *has ever happened to you since the indictment*, and our point is  
10 that we -- that doesn't matter because what had already  
11 happened. And so that's another reason that these witnesses  
12 are going to have to be able to talk about why they're afraid,  
13 and one of the reasons they're afraid is being able to testify  
14 about the attacks that they suffered.

15 **MR. GOHEL:** Just procedurally, Your Honor, that  
16 wouldn't even come up until they've been challenged in  
17 cross-examination and that their credibility has been attacked.

18 So what happened in the grand jury is the prosecutors  
19 would say *aren't you afraid of the Hells Angels, are you afraid*  
20 *of the Hells Angels*, repeatedly. So it would be improper for  
21 them to bolster their testimony prior to them being challenged.

22 Once their credibility is challenged, then potentially it  
23 may be admissible. I think it's up to the Court to -- to make  
24 a determination as to whether or not under 403 that even the  
25 relative probative value is not outweighed by the prejudice



1 because you have a case in which there has been no actions  
2 taken against any witness in this case by any member where  
3 there are, what, eight out of ten defendants that have been out  
4 of custody, seven of whom have been nearby at least some of  
5 these witnesses, at least in theory if they are in Sonoma  
6 County. So I think it would be proper for us to get into that  
7 on recross as well, that these people have not had any  
8 incidents. That, in fact, that many of these witnesses may be  
9 out and about in Sonoma County without really any fear at all,  
10 out in the public, posting on Instagram and whatnot. I think  
11 it does open up a can of worms.

12 **MR. BARRY:** Your Honor, two points about that.

13 Mr. Gohel completely misunderstands the concept of  
14 bolstering. Bolstering has to do with truth statements, the  
15 fact that the Government can get into why the witnesses'  
16 demeanor is such on direct. And also, as we cited in terms of  
17 bias, evidence of bias is always admissible, and we are allowed  
18 and it is proper for us to front issues of bias on direct.

19 **THE COURT:** Well, the problem here is if you front it,  
20 as you say, it raises potential -- it's more prejudicial than  
21 other types of fronting of -- and bolstering of credibility.  
22 And, I mean, I think this is probably going to be moot because  
23 even under Mr. Gohel's scenario, I can't imagine that the  
24 credibility is not going to be challenged. It ain't going to  
25 be much to open that door, even under his proposed staging of

1 this where fear would come in on redirect as opposed to direct.

2 So I don't know how much difference it's going to make,  
3 but I could see the argument that fronting fear is -- may be  
4 more problematic because it raises all sorts of other  
5 inferences and potential prejudice that may not be necessary if  
6 there never -- if they're never challenged on credibility.

7 So, frankly, I think that's going to be moot because I  
8 can't imagine that there is not going to be cross-examination  
9 that goes to the credibility of these witnesses, and once that  
10 happens, I think the door is open to motivation. And so  
11 anyway, that's -- that's my -- my take.

12 All right. Let me -- let me ask about -- I'm going to  
13 skip over some things here. There is a reference here --  
14 Mr. Wendt's Motion No. 5 about having committed 20 murders and  
15 other things. I -- you know, we've already -- I have already  
16 thought about the corpus delicti situation and that's with  
17 respect to the victim one issue. I don't think that's --  
18 that's an issue, but what about other incidents? I'm not sure  
19 exactly what they are. There is some reference to other  
20 murders that were allegedly talked about, and the motion is to  
21 exclude that bragging. Why should that come in?

22 **MR. KRISHNAMURTHY:** Your Honor, I don't -- I actually  
23 don't think the testimony is going to be that Mr. Wendt  
24 committed 20 murders or anything like that. I think this  
25 motion may be referring to the grand jury testimony of witness

1 JH who testified in the grand jury that he was close with  
2 Mr. Wendt and Mr. Nelson and a number of other members of the  
3 Sonoma County and Fresno charters and was part of the initial  
4 planning process to kill Mr. Silva. It was in the context of  
5 that that he says that Mr. Wendt told him that he had killed  
6 other people before and that he had a way of disposing of  
7 bodies in Fresno. So this was all part of sort of the  
8 conspiracy to kill Mr. Silva.

9 So I think in the context of that, it's -- it's reassuring  
10 a recruit that there are ways to address problems. It's  
11 showing the ease with which this crime could be committed, and  
12 so for those reasons, I think it's admissible as a  
13 co-conspirator statement and if not, an admission of a party  
14 opponent.

15 **THE COURT:** So you're saying the testimony from JH  
16 will be in the context of planning the -- Silva's murder that a  
17 statement was made that "I killed others and I know how to  
18 dispose of them."

19 **MR. KRISHNAMURTHY:** Correct.

20 **THE COURT:** And that was part of the planning process.

21 **MR. KRISHNAMURTHY:** Correct. I don't know if it's --  
22 I don't know exactly when temporally it was made, but from the  
23 statements that we have from JH so far, it was part of that --  
24 the process of making the decision to and planning to kill  
25 Silva.

1           **THE COURT:** All right. So it's not just a bragging  
2 statement in isolation. It is one that was part of the  
3 planning process for the act in question.

4           **MR. KRISHNAMURTHY:** Correct.

5           **THE COURT:** What's the response to that?

6           **MS. McCLURE:** Your Honor, the response is that the  
7 corpus delicti rule applies to both the reliability of the  
8 alleged admission and whether in fact the conduct occurred.  
9 And we have really neither of those prongs met here because we  
10 don't have any proof that these other incidents ever occurred.  
11 There is not a shred of evidence to support them. So we don't  
12 have proof that the crimes occurred.

13           **THE COURT:** Except the Government is arguing that  
14 they're not trying to prove that this other crime occurred.  
15 They're trying to say that it was an assurance to a potential  
16 co-conspirator. It's like *I know what to do*.

17           **MS. McCLURE:** Right. But the notion is that -- the  
18 jury is still going to hear this notion of *I know what to do*  
19 *because I've committed other crimes, I've committed other*  
20 *violent murders*, so we get to both the *is there evidence*.  
21 That's why the Ninth Circuit in *Lopez-Alvarez* talks about both  
22 prongs here, not just is the statement reliable, but did the  
23 crimes occur at all, and both have to be met.

24           And I think it's really important to note that this  
25 particular witness, Mr. JH, has already been found to have lied

1 about the details of this -- of this murder, this alleged  
2 murder. So we have someone who is not very reliable who isn't  
3 corroborated by any independent evidence saying things like *Oh,*  
4 *yeah, Mr. Wendt bragged about this killing and that killing.*  
5 That's exactly what this rule is designed to protect against.

6 And I would encourage the Court to really look at that  
7 opinion because it's interesting, in the case, some of the  
8 convictions are reversed, some are affirmed. And the ones that  
9 are affirmed, it was clear that the -- the informant or the  
10 witness talking -- testifying about the admission had -- it was  
11 corroborated. The Court went to lengths to talk about the  
12 specific corroboration, how that witness knew details of the  
13 crime that weren't public.

14 Here we have nothing. I think it's -- again, we have an  
15 unreliable source, uncorroborated about crimes that haven't  
16 even been established with any evidence. I just think it's  
17 squarely within the *Lopez-Alvarez* decision, Your Honor, and  
18 none of it should come in.

19 **THE COURT:** All right. A response.

20 **MR. KRISHNAMURTHY:** Your Honor, I think what takes  
21 this outside the scope of that decision is exactly what the  
22 Court said, the purpose for which this is being offered. We  
23 are not trying to prove that those murders actually happened.  
24 We are just trying to prove that Mr. Wendt said those things  
25 for the purpose of -- of reassuring that witness that there was

1 a way to carry out this plan.

2 **MS. McCLURE:** There is no exception -- well,  
3 Your Honor, read the opinion. I think this sort of exception  
4 is not -- does not exist, that I'm aware of, and it certainly  
5 doesn't take it outside of the holding of that case and the  
6 requirements that the Government has just not met here.

7 **THE COURT:** All right. Let me go on. Testimony --  
8 Mr. Wendt seeks to preclude the Government from eliciting  
9 testimony that either he is violent and dangerous or the Fresno  
10 Hells Angels is a violent and dangerous chapter.

11 What is -- well, is the Government planning to do that,  
12 and what's the justification, starting with allegations about  
13 the -- about the Fresno chapter when the Fresno chapter is not  
14 the enterprise here?

15 **MR. KRISHNAMURTHY:** Your Honor, I don't think we're  
16 planning to elicit specific testimony that the Fresno charter  
17 is a dangerous charter, although that is one of the things that  
18 a particular witness talked about in the grand jury.

19 But with respect to the testimony that Mr. Wendt had a  
20 reputation for being violent, I think that goes directly to the  
21 VICAR allegations in this case. So, again, this testimony is  
22 going to come from someone who is very close to -- to the  
23 defendants who are on trial and other members about the Sonoma  
24 County and Fresno charters.

25 And, again, as the Court knows, one of the things that we

1 have to prove in this case is that these acts of violence were  
2 committed for the purpose of maintaining or increasing one's  
3 position in the enterprise. And one way of showing that is  
4 showing that other members of the enterprise already had a lot  
5 respect status because of their reputations for being violent.  
6 And so that's what we think the relevance of that testimony is.

7 **THE COURT:** Well, is the testimony that others have  
8 gained prominence through violence or that Mr. Wendt himself is  
9 violent?

10 **MR. KRISHNAMURTHY:** Mr. Wendt has gained prominence  
11 through his reputation for violence.

12 **THE COURT:** Why isn't that straight-out character  
13 evidence?

14 **MR. KRISHNAMURTHY:** I don't -- Your Honor, I don't  
15 think it is because that witness is going to talk about  
16 someone's reputation within the enterprise and what gives them  
17 status, and so I think the distinction is sort of clear and  
18 almost like the RICO and VICAR cases, that this is the exact  
19 sort of testimony that the Government tries to elicit to show  
20 VICAR motive.

21 **THE COURT:** Can you give me an example -- is this  
22 going to be reputational evidence, specific-acts evidence?  
23 What is this evidence going to look like?

24 **MR. KRISHNAMURTHY:** Let me offer the Court an example.  
25 So one of the things that we cited in our response was a

1 little snippet from the *Williams* case where someone was  
2 testifying this person had status because they were known to be  
3 consistent shooters. They were known to be -- they were known  
4 to be like killers and that's why they had a lot of status with  
5 the enterprise.

6 And so I think the testimony here is going to be similar  
7 in that not that Mr. Wendt -- I don't think this witness is  
8 going to testify to any specific acts of violence that he saw  
9 Mr. Wendt commit. I think he is going to talk about  
10 Mr. Wendt's reputation for violence within the enterprise and  
11 why that gave him a lot of respect.

12 **THE COURT:** All right. Let me hear the response.

13 **MS. McCLURE:** Classic improper character evidence.  
14 It's that Mr. Wendt has a reputation for violence, therefore he  
15 must or is more likely to have committed this violent act. I  
16 mean, it's what the rules absolutely prohibit, Your Honor, and  
17 this notion that in one particular RICO case where there was a  
18 gang member who is a consistent shooter, I don't know all the  
19 facts of that case or why that testimony was deemed relevant,  
20 but we have Mr. Wendt, who is not a member of the charged  
21 enterprise who is alleged under this association theory  
22 somehow. There has been no articulation of how his reputation  
23 somehow is relevant -- it's -- and it's just character  
24 evidence. I think this is --

25 **THE COURT:** Well, it's back-door character evidence.



1 It looks like 404(a), and the excuse is that well, he's -- the  
2 evidence has shown how he has gained stature. But so what if  
3 he has gained stature? In a way that almost cuts against it.  
4 If he already has stature, why does he have to go out and  
5 commit another murder? What is the relevance?

6 **MS. McCLURE:** I agree, Your Honor.

7 **MR. KRISHNAMURTHY:** Your Honor, because the fact that  
8 somebody already has stature or has gained stature through  
9 these violent acts tends to show act of violence are committed  
10 for the purpose of maintaining or increasing one's position in  
11 the enterprise.

12 And it's not just one case. We also clipped portions from  
13 a couple of other circuit cases that describe testimony exactly  
14 like this.

15 **THE COURT:** Well, a shooter is different. That is  
16 saying somebody had a role of doing X. That's not saying he  
17 was a violent guy and that's why -- so your description of the  
18 *Williams* case sounds not exactly on point.

19 I mean -- again, it raises a 403 because it looks a lot  
20 like a 404(a) issue here, so even if the avowed purpose of your  
21 evidence is to show, number one, he's -- he is violent and  
22 therefore has a reputation and will continue to do so in order  
23 to maintain his reputation, that's pretty marginally probative  
24 compared to the -- to the prejudicial value of somebody saying  
25 this guy is violent.

1           Now, violence could come up in another context if -- if  
2           the defendant puts on character evidence under 404 saying *I'm a*  
3           *peaceful guy and I have never done anything* and then you come  
4           back, then I think that opens the door. But just on its own,  
5           I'm having a hard time seeing, if it is relevant, its real  
6           probative value.

7           So, I mean, we don't know how things are going to play  
8           out, and, again, this all may be moot depending on what the  
9           defense tries to do. It may come in one way or another, but  
10          out of the box, I'm having trouble getting around a 403 because  
11          it looks a lot like 404(a) and I think that's the problem.

12          All right. Let me -- some of these we've talked about.  
13          Hold on here. Let's see.

14                 **MS. McCLURE:** Your Honor, I should have said it  
15                 earlier, that we join in the motions in limine filed by both  
16                 Mr. Nelson and Mr. Ott, and we also join in some of the  
17                 arguments that they made today that were relevant to our  
18                 motions as well.

19                 **THE COURT:** All right. Let me ask about opening the  
20                 door to cremations. The defense has raised some examples of  
21                 what they think does not open the door. If Sparano -- I can't  
22                 remember exactly what it is concerning alleged calls made by  
23                 and to the telephone associated with Robbie Huff. Is there  
24                 some argument that that somehow opens the door to introducing  
25                 the alleged disappearance and demise of Mr. Huff?

1           **MR. BARRY:** Your Honor, this is Kevin Barry.

2           The Court doesn't need to do any -- doesn't need to rule  
3 on anything right now.

4           The purpose of this motion really was to just put everyone  
5 on notice that this is a very serious issue that needs a lot of  
6 thought, and that we didn't want to spring it on the Court the  
7 morning of the -- you know, after LP testifies. But we just --  
8 this is -- you know, it's -- because of the way that these  
9 events happened, they are linked in -- in sequence, and if the  
10 Defense tries to pick away at credibility in a way that opens  
11 the door, then they will have to come in.

12          Again, we don't know what is going to happen until trial  
13 comes, but we want to put everybody on notice this is a serious  
14 issue. I guess it's along the lines of the 18 or 15 issues  
15 that the Court wants us to present next week, but this is one  
16 of them. So -- but I don't think the Court needs to take any  
17 action.

18          **THE COURT:** All right. Well, obviously I'm going to  
19 be listening very closely to the so-called open-door thing, and  
20 it's not going to be that easy to open that door. On the other  
21 hand, that's not to say it's impossible. But given the --  
22 the -- all the issues that are raised if that door is opened,  
23 that door is going to have some weight to it. So I'll just  
24 make that comment.

25          **MR. BARRY:** Yes, Your Honor. But the -- the

1 Defense -- my fear is that the Defense is going to take that  
2 and just push and push and push and just say well, the Court  
3 said we basically can't open it.

4 **THE COURT:** I didn't say that. I didn't say I'm never  
5 going to open the door. I'm just saying there is a lot of  
6 reasons to make that a heavy door.

7 So let's move on.

8 **MR. PHILIPSBORN:** Your Honor, though, if I could -- if  
9 I could, just so we're clear, I think Mr. Barry was saying  
10 this, but he essentially took ownership of two motions that are  
11 asking you for current orders, and those are the Wendt motions  
12 addressing the topic that you were centered on, so I'm assuming  
13 that until -- until the issue is raised with you and until you  
14 change your view or your existing order from June 23rd of 2020,  
15 we're not -- we're not to mention any of these other killings  
16 and other cremations in our openings and any part of the case  
17 until --

18 **THE COURT:** That's correct.

19 **MR. PHILIPSBORN:** -- until we get to a red line.

20 **THE COURT:** It is out. As we stand here right now, it  
21 is out, and the only way it will come in is if the door is  
22 opened. And I'm also indicating that for all the reasons  
23 stated, that the door is going to have to be pushed pretty  
24 hard. I'm not saying it's impossible, but it's going to have  
25 to be pushed pretty hard because there are a lot of

1 consequences to opening that door.

2 **MR. PHILIPSBORN:** Thank you, Your Honor.

3 **THE COURT:** The testimony about -- again, we have sort  
4 of covered this, but from -- from JH about Mr. Wendt describing  
5 the shooting, having killed several Mongols in the area.  
6 Again, now that I understand it, if JH is going to say this was  
7 in the context of the planning and reassurance in the  
8 description, that's one thing. If it's just a random statement  
9 that doesn't, again, sort of further the effort or was not part  
10 of the transaction, then I think there is some serious  
11 questions about that, certainly as a matter of at least 403.  
12 But I guess I'll have to wait and see how this comes out.

13 **MS. McCLURE:** Your Honor, if I may, I'm not sure I  
14 understand what you mean by wait and see how it comes out.

15 **THE COURT:** If the evidence is as it was represented  
16 to me a little earlier, that in the process of planning the  
17 demise of Mr. Silva, Mr. Wendt said, you know, *I know how to*  
18 *dispose of the body because I've done this before*, I know you  
19 object, but to me that is different -- that is -- that explains  
20 that that has a real purpose. It's tied to the transaction,  
21 and even though it may be prejudicial, it seems to me that  
22 that's -- that has a lot of probative value.

23 If it's just *we were talking and he started bragging to me*  
24 *about killing 20 people in Fresno*, that has -- it doesn't  
25 further -- that was not part of the transaction, it's not tied

1 to accomplishing anything. That's the kind of thing that  
2 therefore has very little probative value to me.

3 I understand your corpus delicti argument, which I will  
4 look at the case but I have my doubts as to whether that  
5 applies in the first instance. In the second instance, I think  
6 there is a serious 403 problem.

7 **MS. McCLURE:** I agree with Your Honor that there is a  
8 serious 403 problem, but I would encourage the Court to look.  
9 I think the rule in that case really does deal with admissions,  
10 regardless of their point, so I'm comfortable with that. I  
11 will submit on that. Thank you.

12 **THE COURT:** All right. Thank you.

13 And, again, number of photographs of firearms, that could  
14 well be cumulative to the point where it's overly prejudicial.  
15 I have to see, and, again, I would urge the Government to try  
16 to be selective in what it's going to introduce.

17 Testing of the clubhouse. Let's talk about that for a  
18 moment. And I had issued an extensive ruling about what  
19 forensic evidence comes in. I said that the confirmatory tests  
20 could come in, not the presumptive tests. I said that there  
21 could be then accompanying that an explanation as to why the  
22 confirmatory tests might be negative, etc., etc., so I don't  
23 see any reason to revisit my ruling about confirmatory versus  
24 presumptive tests, what's coming in, what could come in, I  
25 disallowed.

1 But what about the evidence of bullet fragments? I take  
2 it there is evidence that there were evidence of shootings  
3 having occurred in the clubhouse, although not necessarily tied  
4 to the Silva incident. And I take it the Government's argument  
5 is that well, that's probative because it shows, if nothing  
6 else, violence was capable of being had or occurring,  
7 shootings -- guns could be fired in the clubhouse, and,  
8 therefore, it was not an impossibility. Is that -- is that  
9 kind of the relevance?

10 **MS. PENG:** That's correct, Your Honor. And also, you  
11 know, bullets and guns are a part and parcel of the fact that  
12 the members have a weapon.

13 **THE COURT:** All right. What's the response?

14 **MR. PHILIPSBORN:** In November of 2017, the FBI goes  
15 in, finds some evidence that guns have been shot in the  
16 clubhouse. And so -- and I understand the Government -- the  
17 Government's reasoning to try to get this evidence in.

18 All I would say -- and I thought the Government's response  
19 was actually reasonable in view of the objection raised, but  
20 that the -- it should be clear that the purpose for the  
21 admission of the evidence is not specific proof that the gun --  
22 the bullet or bullet jacket or shell casing evidence can be  
23 tied to the Silva killing.

24 **THE COURT:** Right. Well, I'm sure -- and the  
25 Government does not contend that; right? There is nothing to

1 suggest that?

2 **MS. PENG:** No.

3 **THE COURT:** And I'm sure if that is not brought out on  
4 direct, that will be made very clear on cross, that this is --  
5 no connection was established here.

6 **MR. PHILIPSBORN:** Your Honor, yes. Hopefully between  
7 both parties, that will be made clear.

8 Before you go too far away from the -- from the infamous  
9 testing issue, at least as I read -- as I read the Government's  
10 papers, I thought I had the understanding of the Court's ruling  
11 that the Court just stated. I thought that the Government was  
12 suggesting that it's evidence of the processing of the  
13 clubhouse will include some descriptions of the presumptive  
14 testing.

15 I think the Government's concerned that there be no false  
16 picture presented that the governor -- sorry -- that Government  
17 meant was negligent or casual in the way that it went about the  
18 processing of the clubhouse.

19 I think there is a distinction between our remaining  
20 silence on that issue and there being an affirmative eliciting  
21 of their being chemical testing for the presence of blood  
22 inside the clubhouse. That, I think, has been cabined. I just  
23 want to make sure that that is the Court's understanding and  
24 that that's the ruling for now.

25 **THE COURT:** My ruling was that there is not going to



1 be any evidence either of the results or of -- frankly, of a  
2 presumptive blood test being taken because once you raise that  
3 issue, then it naturally raises in the jury's mind, *well, what*  
4 *was the result*. So we are not going to get into that for the  
5 reasons I already stated.

6 The Government's concern about *well, it may look like we*  
7 *weren't thorough*, etc., etc., I don't -- there is already going  
8 to be evidence that there was testing done. It was the  
9 confirmatory tests. I don't think the jury needs to know that  
10 there was another stage of testing that was done which, for all  
11 the reasons I've stated, is not going to be allowed. And, you  
12 know, obviously if the Defense starts to cross-examine and say  
13 *well, you didn't do a really complete job* or something, which  
14 I'm sure you won't do, then, you know, that could open the  
15 door, but, otherwise, there is no need to go into -- even  
16 raise, mention the presumptive tests because that gets us down  
17 a road that I've already said we're not going to go down.

18 So to the extent that the Government intended to include  
19 that as part of the laundry list of things that were done, you  
20 should strike the presumptive blood test reference. We're not  
21 going to go there.

22 **MR. PHILIPSBORN:** Thank you.

23 **THE COURT:** All right. Let me ask about these  
24 offensive imagery: Stuff seized from the Fresno clubhouse,  
25 which, again, Fresno is not the enterprise here. It's Sonoma

1 County. I'm having trouble understanding why that's relevant  
2 here.

3 **MR. BARRY:** Your Honor, this is Kevin Barry.

4 Most of the things -- the material that we are -- that we  
5 are introducing into evidence from Fresno has to do with their  
6 connection to both, Salem, where Mr. Ranieri is president, and  
7 with Sonoma County. You know, there are things like  
8 Mr. Nelson's framed boxing shorts, there are tributes  
9 between -- to and from members of Sonoma and members of Fresno.

10 So I'm not quite sure about what the other issue is in  
11 terms of offensive imagery, but that's the goal, to show that  
12 there was a tight connection between Sonoma County and Fresno.

13 **THE COURT:** No. I understand that. But apparently  
14 there is some -- there is going to be some allegedly  
15 inflammatory stuff that was obtained from the Fresno inventory  
16 sexist is, racist, picture of an ax with a noose around --

17 **MS. McCLURE:** That's correct, Your Honor.

18 **MR. BARRY:** Your Honor, I believe what they are  
19 talking about is the imagery of Mr.-- Mr. Hefferman in the KKK  
20 hood. I think that's all part and parcel of the -- of the  
21 white supremacist motion because there were photographs of  
22 Mr. Wendt and Mr. Hefferman that are in the -- in the motion  
23 with the lightning bolt, SS Filthy Few flag and things like  
24 that. I think that's what they are getting at. And whatever  
25 the Court rules on that I think will cover these.

1           **THE COURT:** All right.

2           **MR. BARRY:** Just to be clear, there were some  
3           incredibly offensive images from electronic devices. We are  
4           not seeking to introduce those. We think those would go beyond  
5           the pale, but the ones that we have identified do have a link  
6           between the images that the enterprise has adopted and they do  
7           show a connection between Fresno and Sonoma County.

8           **THE COURT:** Okay.

9           **MS. McCLURE:** There is also sort of suggestive,  
10          arguably, I guess -- I don't know how to describe it, but  
11          paintings on the walls in the Fresno clubhouse of a woman in a  
12          suggestive pose.

13          Mr. Philipsborn, jump in if I'm forgetting here other  
14          images from the Fresno clubhouse, but our position is that  
15          the -- images in the Fresno clubhouse are not relevant here,  
16          and there is a 403 issue.

17          **THE COURT:** Right. Well, that's what I thought. If  
18          it's painting on the walls of the Fresno clubhouse that's  
19          different from a picture of an HASC member with Mr. Wendt in a  
20          costume or something. So stuff that's just particular to  
21          Fresno, it seems to me -- I don't see the relevance. If it is  
22          relevant, it's barely relevant.

23          **MR. BARRY:** Actually, Your Honor -- sorry. I didn't  
24          understand that's where they were going.

25          The allegation is that's where Joe Silva was murdered, so

1 the jury has to be able to see what the location looks like.  
2 So pictures of the inside of the clubhouse could not be more  
3 relevant based on the critical charge in this case.

4 **THE COURT:** Well --

5 **MR. BARRY:** I don't see how they can say that the jury  
6 can't see that. I didn't know that's where they were going  
7 because it makes absolutely no sense.

8 **THE COURT:** Well, if you are saying incidentally in a  
9 picture of the scene where the -- where the murder allegedly  
10 occurred and you can see incidentally in the background some  
11 photo, that's one thing, but if you are going to introduce this  
12 as evidence of, well, see what a sexist, racist club this is,  
13 that's different.

14 **MR. BARRY:** Yeah. But the goal is like this is what  
15 the Fresno clubhouse looks like.

16 **THE COURT:** Well, yeah. If it's relevant to -- you  
17 know, you don't have to have a thousand pictures and you don't  
18 have to have a picture of the mural if it has nothing to do  
19 with where the murder took place. I don't know if it does or  
20 not. It may be that happens to be where the alleged shooting  
21 occurred, but, you know, it's got to be relevant to the matter  
22 at hand.

23 So I guess I'll just have to reserve judgment until I see  
24 it. If it's gratuitous, then there is going to be a 403  
25 problem as well as a relevance problem.

1           **MR. BARRY:** Your Honor, as I indicated, there are some  
2 horrendously gratuitous images that we're not getting into, but  
3 I think the jury will see it when it comes in, but the jury  
4 should be able to see the crime scene.

5           **THE COURT:** All right. Let me ask, on Mr. Scheetz, I  
6 have already said that he can testify as to the -- the opinions  
7 that I allow him to testify on and he can, of course, identify  
8 the bases of those opinions, whether it's from a book or from  
9 some writing, you know, some charter or something else. But  
10 that -- that's how some of these incidents may come in, to the  
11 extent that it is something he's done, and he has rendered an  
12 independent -- as I said before, he can't just be a conduit and  
13 say *this, this and this happened*. It has to be part of a  
14 synthesis, part of his analysis, but the bases are likely to  
15 come in. So I don't know what else to say about that.

16           **MR. PHILIPSBORN:** Your Honor, I think that's all we  
17 were looking for. So submitted on that one.

18           **THE COURT:** Okay. And then finally, Mr. Heinrich so  
19 he's not going to give any -- from what I understand from the  
20 Government's response, he's not going to offer any opinion.  
21 He's just going to explain what he does and how -- what he does  
22 with witnesses and when he pays them and how much he pays them,  
23 is that my understanding.

24           **MR. BARRY:** Exactly. That's exactly it, Your Honor.  
25 It's not going to be like -- I don't know what the Defense is

1 worried about, you know, that he developed some threat matrix  
2 and these are the most at-risk witnesses. No. It's what kind  
3 of -- what kind of payments do you authorize for witnesses and  
4 when did you pay these people and for what. It couldn't be  
5 more simple.

6 **THE COURT:** What about the *why*? There is reference in  
7 there about why he paid them. What is the testimony going to  
8 be about that?

9 **MR. BARRY:** As we indicated in our letter to the  
10 Defense, it's for subsistence, it's for cell phones, and often  
11 for -- in fact, some of the more sizeable payments were for  
12 actual relocation, things like first-and-last-months rent,  
13 things like that.

14 **THE COURT:** In other words, what it was for, not the  
15 motive like *oh, I -- I calibrated the fear factor to be X and*  
16 *therefore I figured I'm going to have to increase this payment*  
17 *by double?*

18 **MR. BARRY:** No. Especially not this witness. He's  
19 more sort of the administrative aspect of it.

20 We anticipate that other witnesses will say *yeah, we made*  
21 *arrangements to get this witness out of town*, but that's not  
22 what -- those are percipient witnesses talking about what they  
23 did. Special Agent Heinrich, if he actually testifies, would  
24 be *yeah, I made these payments and this is what the payments*  
25 *were for and here's why I made them.*

1           **THE COURT:** Okay.

2           **MR. BARRY:** And if the Defense wants to cross him on  
3 that, then he might get was this consistent with policy and  
4 things like that, but, yeah, generally it's -- the Defense has  
5 made a huge issue about payments. And in case we need to  
6 address that, we've identified him as a witness for that  
7 reason.

8           **THE COURT:** All right. I understand. I understand  
9 there is almost a constitutional theory about witness payments,  
10 and I'm aware of that issue.

11           All right. Well, we've covered --

12           **MR. PHILIPSBORN:** Your Honor, just on that one  
13 witness, without belaboring it, the main concern is if -- if  
14 it's kept simple and tight, then he testifies exactly as  
15 Mr. Barry presumes, he may testify. One of the difficulties  
16 being is if he starts explaining what payments were for, then  
17 we get into the documentation that has been generated. In the  
18 cases I've been in to this point, it -- it's been somewhat  
19 usual, although grudging at times, for the Government to  
20 actually just turn over some of the documentation that exists  
21 about the payments, and actually the reason for it so that you  
22 don't essentially have to question somebody in the dark about  
23 why somebody was paid and how the documentation is maintained  
24 and how there's -- there are policies and procedures to  
25 accomplish this, so all I wanted to do is to try to see if --

1 if it's kept simple, then no problem, but if we get a little  
2 bit further down the line, then I think the Government's  
3 position that we're entitled to know essentially in the form of  
4 a letter disclosure with a spreadsheet in it how much people  
5 were paid and what date they were paid on but we can't see the  
6 vouchers, we can't see any of the internal memoranda that are  
7 normally provided, we can't see any of that kind of  
8 documentation -- I think that that may in the end be a problem.  
9 So I just wanted to flag it. It's sort of -- I'm borrowing  
10 Mr. Barry's theory of this is a flagging motion.

11 **THE COURT:** Well, maybe we ought to address this  
12 sooner rather than later.

13 You are saying if there is testimony about what the  
14 payments were for, for, let's say relocation, you think that  
15 you're entitled then to some additional documentation about the  
16 decision to make that payment? Or tell me more about what it  
17 is you're looking for.

18 **MR. PHILIPSBORN:** Just the documentation that is  
19 generated when payment is actually made and authorized and the  
20 reasoning for the payment. And I won't go too far into this,  
21 but witness JH, for example, at times is dealing sort of  
22 low-grade extortions of the FBI and task force officers by  
23 periodically saying *look, I've gone as far as I can go, you*  
24 *people aren't helping me*, etc. And then it seems that the  
25 logjam is worked through, and he is rendered happy again, and



1 he also actually receives a payment.

2 There are occasions on which -- and to the Government's  
3 credit, they disclosed this -- he's texting a handler saying  
4 he's in need of funding. I have no idea if that actually  
5 resulted in any action from the FBI. They might not have  
6 authorized any payment in response to that particular request,  
7 but without the documentation, it's a little bit hard to tell  
8 how those things were reacted to.

9 So all I'm forewarning the Court is we may get to points  
10 at which there is a legitimate basis on which for us to  
11 actually get copies of documentations of the basis for payments  
12 made to certain witnesses at certain times; otherwise, I  
13 completely agree. If somebody has relocated and that's the  
14 extent of the reason for a lump-sum payment, then that's it.  
15 That's the -- that's the reasoning.

16 **THE COURT:** So when you say documents when payment is  
17 made, what does that look like? What are these documents?

18 **MR. PHILIPSBORN:** Mr. Barry knows better than I do.  
19 I'm not being facetious or disrespectful, but I've never been  
20 in his position, but I have been in cases in which we had  
21 copies of documentation that was provided to us through an  
22 agency, through the FBI and through the DEA, and it showed sort  
23 of the -- you know, their payment system. It's the federal  
24 government. It's a fairly well-documented apparatus, at least  
25 the apparatus that I was privy to.

1           And I know that for the task force officers -- I don't  
2 know so much about Santa Rosa, but in other -- in other cases  
3 in which local law enforcement was also springing a bit for the  
4 cooperators, they produced ledgers so you could tell what the  
5 payments were for.

6           Again, I'm not suggesting that there is an absolute need  
7 to go down that road. I'm just saying, depending on how the  
8 testimony comes out or how the cross-examination of some of  
9 these cooperators goes, we may have to get access to whatever  
10 specific payments may be in question and, you know, get some  
11 understanding of what the documentation for the payment says.

12           **THE COURT:** You have --

13           **MR. BARRY:** I'm sorry, Your Honor.

14           **THE COURT:** You have the information about timing and  
15 amounts of payments; right?

16           **MR. PHILIPSBORN:** Yes, Your Honor, we do.

17           **MR. BARRY:** In fact, Your Honor, in the flurry of  
18 materials in the last week, Mr. Philipsborn may have missed  
19 this, but we actually did update the dates of the payments, so  
20 Mr. Philipsborn can track, you know, as he described it,  
21 extortion texts and see if it was met with a later payment. So  
22 he does have the dates of payments made to specific witnesses.

23           **MR. PHILIPSBORN:** I agree. I saw that letter, and  
24 Mr. Barry is absolutely right. That was updated information.  
25 But, again, I'll submit it. We're at the end of a long day,

1 but that's --

2 **THE COURT:** All right. I'm just not sure what  
3 other -- if you're talking about some kind of a voucher thing  
4 or something --

5 **MR. PHILIPSBORN:** Exactly. Exactly, Your Honor. And  
6 so I'll tell you what. In part, because of what Mr. Barry  
7 explained, if necessary, we will make a more specific request  
8 that is focused on certain payments if there is the need for us  
9 to make those requests.

10 **THE COURT:** I think that's fair because I don't want  
11 to have this come up in the middle of somebody's testimony at  
12 trial and then we have to take a recess because you've got to  
13 get the documents.

14 **MR. PHILIPSBORN:** Understood.

15 **THE COURT:** All right. Well, this has been helpful.  
16 I've got a few things obviously to do. I'm going to try to  
17 rule on as many of these as I can. Obviously some of this  
18 stuff is going to have to be reserved for trial. And I've got  
19 the 11 x 17 chart in mind as 59 pages long of 11 x 17 that I'm  
20 going to get out a ruling on. They are going to be succinct  
21 rulings, but you'll have rulings on as many of these things as  
22 I can. Some of it will have to await trial, but my goal is to  
23 get the parameters down as much as possible, take as many  
24 things off the table as possible so you know what's coming,  
25 what's in and out from my perspective, and, if nothing else,

1 you'll also know how I'm framing stuff so if things come up,  
2 you'll understand how I'm seeing these matters. I want to  
3 minimize, you know, argument before the jury and time wasted --  
4 time spent with the jury waiting.

5 **MR. PHILIPSBORN:** So to minimized -- again,  
6 Philipsborn for Wendt -- time wasted, would the Court be  
7 willing to clarify whether it has a view as to how far in  
8 advance of witnesses actually appearing the Defense should be  
9 notified of their appearance?

10 **THE COURT:** Yeah. I think witnesses and the exhibits  
11 intended in connection with those witnesses should be done two  
12 court days in advance so that if I have a court day before the  
13 day before the actual presentation of that testimony, I can  
14 either hear argument if I need to hear argument, or I can get a  
15 ruling out so you'll know because I need time to see what's  
16 going to come, what the objections are so we'll have to -- I'll  
17 have to lay out a time frame of when it's disclosed, when any  
18 objection is made, and then how we're going to rule, but we're  
19 going to do it on a rolling basis, but I think essentially two  
20 days in advance for a case of this complexity is -- and given  
21 the number of issues that you all have raised, I think that's  
22 an appropriate amount of time to give both the parties and me a  
23 chance to make rulings.

24 **MR. KRISHNAMURTHY:** Your Honor, I actually had one  
25 quick housekeeping issue before we end today.

1           **THE COURT:** Yes.

2           **MR. KRISHNAMURTHY:** We ordered and obtained a  
3 transcript from the sealed hearing last week. The court  
4 reporter has reminded me that I should have obtained an order  
5 from the Court authorizing the release of that transcript, and  
6 so I apologize for that oversight, but I was wondering if the  
7 minute order for this hearing could reflect that the Court  
8 authorizes either party to obtain that transcript so long as  
9 they keep it under seal.

10          **THE COURT:** All right. No objection, I assume?

11          **MR. WAGGENER:** No objection. I got a copy of the  
12 transcript and distributed it to the Defense. So long as it's  
13 mutual for both sides.

14          **THE COURT:** Otherwise under seal but for use only by  
15 the parties and counsel.

16          **MR. KRISHNAMURTHY:** Thank you.

17          **THE COURT:** So ordered. We will make sure that is  
18 reflected in the minutes.

19          **MR. BARRY:** This is Kevin Barry again. One last  
20 question.

21           I don't know if the Court wants any more material, but in  
22 light of the fact that so much of this -- this argument has  
23 centered around Rule 403, very often we did not propose  
24 limiting instructions, so if there are issues where the Court  
25 is wrestling with it, if the Court wants to put in the minute

1 order you want proposed limiting instructions on certain  
2 issues, we are happy to provide those.

3 **THE COURT:** All right. I'll keep that in mind.  
4 Great. All right.

5 **MS. PENG:** Your Honor, one last issue.

6 So there was, I think, a minute order issued by Your Honor  
7 about joint exhibit lists, objections and responses due on  
8 March 15th. I just wanted to raise here that the Government  
9 still has not received the Defense's list of objections to our  
10 exhibits which were previously ordered due March 9th. So we  
11 had expected that we would get those objections and we would  
12 have time to file our responses to meet the 15th deadline, but  
13 at this point I'm not sure quite sure when we can expect those  
14 objections.

15 **THE COURT:** All right. Let's hear from the Defense.

16 **MR. WAGGENER:** I can speak to that issue, Your Honor.

17 The first thing I would point out is that for -- well,  
18 one, I think the Court has a pretty good idea of all the things  
19 that have been going on with what the Defense has been occupied  
20 with over the last 10 days or so, but we just got the complete  
21 set of electronic exhibits from the Government so that we could  
22 everything together. I think it was two, maybe three days ago,  
23 and those went to the discovery coordinator.

24 That set of electronic exhibits of the -- we're now up  
25 to -- 13-, 1400 exhibits have now been distributed to us.

1 Speaking of 11 x 17 pages, the list and the exhibit list with  
2 all this information is about 70 pages on a an 11 x 17.

3 We are -- have not been able to fully digest all of these  
4 exhibits and to address all of this. I speak for my  
5 colleagues. I talked to them about this this morning. I don't  
6 know that -- you know, there is also a complication with  
7 Ms. Morrissey not being available for the last eight days, but  
8 we're working on it, but in terms of what I'm terming a fulsome  
9 set of objections to the exhibits, we're doing the best I  
10 can -- we can, all of us can, to examine this and to have a  
11 mutual list that we all share and make our objections and get  
12 it to the Government.

13 I don't think that it's realistic -- I'm happy to discuss  
14 this and it came up. I don't think it's realistic for us to  
15 get that by the 15th. We are working hard on it. I don't know  
16 if one of my colleagues want to speak more to this whole issue  
17 of how we are looking at these exhibits, but it is a work in  
18 progress.

19 **THE COURT:** Well, for one thing, I've asked for a  
20 bellwether example of 15. You certainly can do that; right?  
21 And I want to be able to discuss this at the pretrial  
22 conference so you can identify 15, each side representative --  
23 and the idea is to get some representative -- there is going to  
24 be some patterns here and, you know, even though you didn't get  
25 all the physical exhibits, you have had this for a while now,

1 so by the 15th, I certainly think each side can identify 15  
2 bellwethers which we can then discuss at the pretrial  
3 conference.

4 **MR. WAGGENER:** Yes. We can do that.

5 **THE COURT:** And then I would like the fulsome one, how  
6 about at least by the end of that week, by the pretrial  
7 conference, by the 18th.

8 **MR. WAGGENER:** We'll get on it, Your Honor. I  
9 understand the Court wants to set deadlines, and we're  
10 approaching this trial, so we will do the best we can.

11 **THE COURT:** Okay.

12 **MR. NOVAK:** Your Honor, this is Richard Novak. I have  
13 a question.

14 I may be the only one in the room, but I don't really  
15 understand what the Court means by bellwether objections.

16 **THE COURT:** All right. So I'm probably not going to  
17 rule in advance at trial on 1400 exhibits, and I'm hoping that  
18 exhibit list is going to be a lot slimmer than that, but I  
19 found it's useful for the parties to pick out *here are some key*  
20 *documents*, either by category, you know, involving this kind of  
21 problem, you know, and each side -- I usually say -- well, you  
22 know, whatever the number is, 10, 15, sometimes 20, whatever.  
23 Those rulings will serve as guideposts, hopefully to the  
24 parties, so you'll know what my thinking is on -- on whether  
25 it's a hearsay rule, whatever the objection is. And so they're



1 examples, so they're bellwether, essentially.

2 It also helps me understand more what's coming down the  
3 road because I don't want to be hit with something for the  
4 first time and it's a problem I've never even thought of. I  
5 want to be able to see what of the tough ones, what are the  
6 ones that, you know, give me a fair chance to have thought  
7 through some of these -- if there are some trickier issues or  
8 critical documents, sometimes based on the most critical  
9 documents. In this case, you know, 15 is not going to do it,  
10 but it's a useful exercise.

11 **MS. PENG:** Your Honor, so a follow-up question. Given  
12 that we've discussed today some of the exhibits that are going  
13 to come in, are these representative exhibits hopefully not  
14 going to be duplicative of the racist imagery, some of those  
15 things --

16 **THE COURT:** Yes. Since we have been discussing a lot  
17 of this and I'm going to rule on some of this, some of the  
18 evidentiary stuff is already incorporated in the MILs. Don't  
19 waste your 15 on something I've already given you an indication  
20 how I'm going to rule on some of this --

21 **MS. PENG:** Right. And is the Court expecting the  
22 Government to kind of raise key documents, because clearly it's  
23 our exhibit list at issue so we don't necessarily want -- I  
24 mean, we're not going to object to our own list. So is the  
25 Court looking for us to identify key documents, or what is the

1 Government expected to do?

2 **THE COURT:** All right. I'm expecting the Defense to  
3 have its list of exhibits. There may be some -- so you can use  
4 some of the 15 on those. If there are some documents that you  
5 want to -- kind of like a declaratory clearance in advance that  
6 you can anticipate, that would be a good idea because I'm  
7 trying to give you advance rulings so you sort of know what the  
8 rules of the road are going to be.

9 **MS. PENG:** Okay. Thank you.

10 **MR. WAGGENER:** Your Honor, I've made this suggestion  
11 before. I think it would be a good idea for us to provide the  
12 Court with a full set of the exhibits now that we all have them  
13 in electronic form.

14 **THE COURT:** Yeah.

15 **MR. WAGGENER:** That way you could see some of these  
16 photographs, you could actually put -- pull them up on the  
17 screen.

18 **THE COURT:** Yep.

19 **MR. WAGGENER:** I would ask the Government to provide  
20 that set of documents. If they can't do it, then I can get a  
21 drive over there, work it out. But the sooner the better that  
22 the Court has access to that stuff I think is better for all of  
23 us.

24 **THE COURT:** I will ask the Government to do that, make  
25 sure that we have your -- the actual exhibits so -- chances are

1 I will need to look at photographs or whatever it is or  
2 transcripts or whatever it is that is going to be an exhibit.

3 **MR. BARRY:** Certainly, Your Honor.

4 Mechanically how does the Court want that to happen?

5 **THE COURT:** Well, for now, I guess in some digital  
6 form that we can download.

7 **MR. BARRY:** Yes. I mean, delivered to chambers? Is  
8 there anyone in chambers?

9 **THE COURT:** That's a good question. If you bring it  
10 to the clerk's office, they will figure out a way -- Vicky, we  
11 can alert the court clerk's office. They can figure out a way  
12 of getting it to us.

13 If we had time, we would set up box.com, something, some  
14 kind of Cloud --

15 **MR. BARRY:** We might be able to work with your  
16 courtroom deputy about getting a USA Effects account set up.

17 **THE COURT:** Yes. Something like that would be even  
18 better, frankly. Then we can access remotely or from the  
19 courthouse.

20 **MS. PENG:** I just want to flag that we might need more  
21 time to do this because obviously a lot of the exhibits here  
22 are very voluminous because they are cell phone extractions,  
23 numerous of them, video, things like that so I think we will  
24 have to figure out the best way to do that.

25 **MR. WAGGENER:** Your Honor, I just pulled it up on my

1 computer screen, and it's a little over 80 gigabytes of  
2 material. I don't know if USA Effects is going to be the most  
3 effective with that so probably getting a drive would be the  
4 best way to do it.

5 **THE COURT:** Okay. Well, maybe for now if you can just  
6 put it on a drive -- we can get two drives so we have a couple  
7 copies of that.

8 **MR. BARRY:** We'll work on it, Your Honor.

9 **THE COURT:** Okay. In fact, if you are going to make  
10 two, if you could give me three, that would be helpful. All  
11 right.

12 **MR. NOVAK:** Your Honor, I know we are getting to the  
13 top of the hour. I have one more very quick issue.

14 The parties -- or at least some of the parties -- have  
15 filed some jury instruction materials. At least on behalf of  
16 Mr. Nelson, I think there is still at least one lingering  
17 concern with one of the Government's proposed instructions, and  
18 I will discuss that with Government counsel. It's instruction  
19 44, which has something to do with *Pinkerton* and VICAR. We  
20 will talk about it.

21 I just want the Court to know the filings related to the  
22 jury instructions are almost complete, at least as far as we  
23 can get at this point because we don't know really what the  
24 final jury instructions need to look like, right, until we see  
25 what kind of he testimony there is, what kind of exhibits there

1 are, right, what type of evidence is offered for certain  
2 purposes and not other purposes. But even for this very sort  
3 of preliminary stage with respect to jury instructions, there  
4 is just a little bit more that needs to come in concerning -- I  
5 think it's Counts Eight and Nine at this point -- Six and  
6 Seven. Six and Seven. I'm sorry.

7 **THE COURT:** All right. And, yes, I'm looking for  
8 something to be over-inclusive because chances are we may end  
9 up deleting a bunch of instructions because stuff was never  
10 used for a limited purpose or whatever. Obviously it's always  
11 subject to change -- adjustment given trial evidence and  
12 everything else.

13 **MR. NOVAK:** I assume we would have like a final jury  
14 instruction conference between the closing of evidence and the  
15 instructions and argument; right?

16 **THE COURT:** We will. But I'm going to issue  
17 something -- what I consider, you know, maybe not final-final  
18 but semifinal before you start because I -- unlike some judges,  
19 I like to have the substantive instructions resolved as much as  
20 possible based on our understanding of what the evidence is  
21 going to look like because, number one, that will help you  
22 understand what the rules I intend to apply are in terms of  
23 presentation of your evidence, your arguments, etc., etc.;  
24 Two -- and I want the parties to start thinking about this,  
25 given the nature of this case, this is, I think, one of those

1 cases that warrants consideration of giving some substantive  
2 instructions in the beginning so the jury has some idea of  
3 what -- what you're all trying to do. I understand there is  
4 going to be an opening statement, but I think it's useful to  
5 think about whether there are some instructions on the law that  
6 may be -- not the whole thing because then it will be  
7 overwhelming to them, but something in the beginning so they  
8 have some guidance to understand, you know, why this enterprise  
9 evidence is coming in, for instance.

10 So, yes, I --

11 **MR. NOVAK:** Understood.

12 **THE COURT:** Nothing is final until it's final, but I  
13 do like to have a substantive discussion and an intended set of  
14 instructions going into this.

15 **MR. PHILIPSBORN:** Your Honor, this is Philipsborn.

16 Just so the Court knows, the Government actually has put a  
17 fair amount of work into the process, and we -- for the last  
18 week, I've essentially been the Defense lawyer involved in the  
19 process.

20 We have almost completely complied as much as we can with  
21 the Court's directive, and any delay in finalizing -- I think  
22 there -- in the packet we've got, in addition to Mr. Novak's  
23 issue -- as of this morning, there may have been one or two  
24 instructions that I hadn't clarified some edits on, but the  
25 point is we're almost there in terms of your getting the -- the

1 instructions you wanted submitted today, and we could submit  
2 them with the understanding that there -- there are some  
3 Defense objections that the Government is trying to clarify the  
4 scope of with me that we're still -- that I need to talk to my  
5 colleagues about which I think involve one or two instructions.

6 **THE COURT:** Well, if it means an extra day to try to  
7 clarify, that's fine. I would rather try to get as much of the  
8 testimony sort of clarified and teed up as possible so if you  
9 need an extra day or so, that's fine as well.

10 I saw from your statement the comment about the format  
11 doesn't give you enough space to make your arguments, and I  
12 didn't mean to say you can't use more than, you know, a hundred  
13 words or something, but I did want the discussion to be tied to  
14 a particular instruction and not some long brief so I can look  
15 at each instruction and say *well, here are the parties'*  
16 *respective positions*. So maybe the footnote is a rather  
17 lengthy footnote, but it's helpful to have it appended in a way  
18 and organized in a way that I can see it in and see the  
19 context.

20 **MR. PHILIPSBORN:** Fully understood, Your Honor.

21 I think the reason for the comment may apply to just a  
22 very few instructions in which the Government essentially, you  
23 know, provides a fairly full response to what essentially is a  
24 footnote Defense objection, and where our footnote may have  
25 been a little light on either authority or explanation, that's

1 what we were concerned to make sure that we at least made a  
2 record on so that -- given the importance of the instructions.

3 **THE COURT:** Yes.

4 **MR. PHILIPSBORN:** Again, we will be looking at that  
5 over the next couple of days, and we'll get it to you  
6 forthwith.

7 **THE COURT:** All right. Great. Thank you.

8 Anything else?

9 **MR. BARRY:** Nothing from the Government. Thank you,  
10 Your Honor.

11 **THE COURT:** All right. So I guess we'll see you next  
12 Friday. Thanks everyone.

13 (Proceedings adjourned at 4:00 p.m.)  
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Monday, March 28, 2022

/s/ Pamela Batalo Hebel

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Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR  
U.S. Court Reporter